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ALEXANDER L. STEVAS,
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NO. 82-1711

IN THE

SUPREME COURT OF THE UNITED STATES

THE STATE OF COLORADO,
Petitioner,

vs.

FIDEL QUINTERO,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the Colorado Supreme Court mistakenly interpreted the Fourth Amendment's prohibition against unreasonable search and seizure when it applied the exclusionary rule to an undisputed good-faith seizure of stolen property.

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OPINION BELOW

The opinion of the Colorado Supreme Court is included as Exhibit "A".

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Writ of Certiorari to the Supreme Court of Colorado is here sought to review the judgment and opinion in The People of the State of Colorado v. Fidel Quintero, 657 P.2d 948 (Colo. 1983).

This case involved an interlocutory appeal by the People of the State of Colorado, (hereafter referred to as "the People" or "the Prosecution").

Colorado Appellate Rule 4.1(g) Exhibit "B" in the appendix to this Petition, specifically prohibits a petition for rehearing on interlocutory appeals in criminal cases.

Hence, on the same day that it issued its opinion, January 31, 1983, the Colorado Supreme Court also issued an order of remittitur to the trial court.

On February 16, 1983, the People filed a motion to vacate remittitur, Exhibit "C" to this petition. On February 22, 1983, this motion was denied and the judgment thereupon became final.

The trial court has stopped proceedings concerning this case pending filing of this Petition for Writ of Certiorari.

2. The jurisdiction of this Court is invoked pursuant to Rule 17(1)(c) of the Revised Rules of the Supreme Court of the United States, which provides that a review on writ of certiorari may be considered "when a state court or a federal court of appeals has decided an important question of federal

law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court." U.S. Sup. Ct. Rule 17(1)(c), 28 U.S.C.A.

The date of the Colorado Supreme Court's opinion in the interlocutory appeal was January 31, 1983. The date of the Order that denied the People of the State of Colorado's Motion to Vacate Remittitur is February 22, 1983. Pursuant to U.S. Sup. Ct. Rule 20(1), 28 U.S.C.A., "A petition for writ of certiorari to review the judgment in a criminal case of a state court of last resort or of a federal court of appeals shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment."

CONSTITUTIONAL PROVISION INVOLVED IN THE SUBJECT CASE.

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV.

CONCISE STATEMENT OF MATERIAL FACTS

On September 29, 1981, at 12:45 p.m., Darlene Bergan was sweeping her porch at 691 South Vine Street, Denver, Colorado. She saw the defendant go up on the porch of a house across the street from her and peer into the front door and the front window for approximately twenty seconds each. He then left the porch, walking north and looked at the side of the house. Mrs. Bergan thought he was acting strangely and watched him continue walking north until he crossed the street and disappeared from her sight.

Mrs. Bergan saw the defendant again about 40 minutes later standing at the bus stop in front of her house. He had taken off his short sleeved shirt and thrown it over a television set. Defendant was pacing nervously and trying to hitchhike while waiting for the bus.

Mrs. Bergan called the police, and the radio dispatcher reported a possible burglary suspect at the bus stop at Vine and Exposition, wearing a T-shirt and with a television set covered with a shirt.

Officer Freeman, a Denver police officer for 21 years, arrived within 5 minutes of the call; saw the defendant waiting by the bus stop in his undershirt; and asked him for identification. The defendant had no identification and claimed that he had paid

someone in the neighborhood $100 for the television.

Other officers arrived within 2-3 minutes, and Mrs. Bergan made herself known to the officers as the person who had called the police and reported what she had seen. After Mrs. Bergan identified herself, the defendant was arrested and searched. Although it was a hot day, with the temperature in the 80 degrees, the officers found a pair of brown wool gloves in defendant's back pocket. Under the shirt was a television set and video game. The police also found $139 in cash; 5 rings, including 2 class rings with different initials and class years; and, some ladies jewelry when defendant was searched at police headquarters

Later that day, David and Carol Rogers reported their house at 791 South Vine, Denver, Colorado, had been burglarized and a television set and video game stolen. They identified the television set and video game recovered from the defendant as the items taken in the burglary.

The defendant was charged by information with second degree burglary. In a trial to the court, the court considered the trial evidence to determine both guilt and defendant's motion to suppress evidence seized at the time of his arrest. The trial

court found defendant guilty of second degree burglary and denied the motion to suppress. Thereafter, the trial court granted defendant's motion for new trial and his motion to suppress, because of People v. Schreyer, 640 P.2d 1147 (Colo. 1982).

The prosecution took an interlocutory appeal from the trial court's ruling to the Colorado Supreme Court, specifically requesting a review of the trial court's suppression of the television set, video game and gloves.

The Colorado Supreme Court affirmed the ruling of the trial court (see Exhibit "A"). The Colorado Supreme Court found that although the arresting officer "believed that probable cause existed to arrest Quintero", the good faith exception to the exclusionary rule could not remedy a violation of the Fourth Amendment, because the United States Supreme Court had not yet recognized such an exception, citing Taylor v. Alabama, ___ U.S. ___, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982).

The Colorado Supreme Court decision was made notwithstanding §16-3-308, C.R.S. 1973 (1982 Cum. Supp.), adopted by the Colorado Legislature in 1981 and effective July 1, 1981, which renders evidence admissible when seized as the result of a "good faith mistake."

ARGUMENT

This Petition for Writ of Certiorari, therefore, is requested to resolve the issue whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), may be modified by duly enacted state statute so as not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure was consistent with the Fourth Amendment.

The following section demonstrates why this question should be settled by this Court.

6. The Colorado Supreme Court has relied in its decision upon Taylor v. Alabama, ___ U.S. ___, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982), where this Court declined to recognize a "good faith" exception to the exclusionary rule. Although Colorado has enacted a statute which provides for such an exception, the Colorado Supreme Court held that it would be inappropriate "to alter established Fourth Amendment doctrine by approving such an exception at this time", in light of Taylor v. Alabama, supra.

The majority of the United States Supreme Court has not recognized a good faith exception to date, but several Justices have

urged the adoption of a good faith exception to the exclusionary rule. E.g., Stone v. Powell, 428 U.S. 465, 538, 96 S.Ct. 3037, 3073, 49 L.Ed.2d 1067 (1976) (White, J., dissenting); Brown v. Illinois, 422 U.S. 590, 610-12, 95 S.Ct. 2254, 2265-66, 45 L.Ed.2d 416 (1975)(Powell, J., concurring).

The issue of whether the exclusionary rule should be modified by a good faith exception is presently before this Court in Illinois v. Gates No. 81-430, with one major distinction:

Illinois state law supported suppression of the evidence, whereas the Colorado General Assembly has enacted §16-3-308, C.R.S. 1973 (1982 Cum. Supp.), which provides in pertinent part:

> 16-3-308. Evidence - admissibility - declaration of purpose. (1) Evidence which is otherwise admissible in a criminal proceeding shall not be suppressed by the trial court if the court determines that the evidence was seized by a peace officer, as defined in section 18-1-901(3)(l), C.R.S. 1973, as a result of a good faith mistake or of a technical violation.
> (2) As used in subsection (1) of this section:
> (a) "Good faith mistake" means a reasonable judgmental error concerning the existence of facts which if true would be sufficient to constitute probable cause.
> * * *
> (4) It is hereby declared to be the

> public policy of the state of Colorado that when evidence is sought to be excluded from the trier of fact in a criminal proceeding because of the conduct of a peace officer leading to its discovery, that it will be open to the proponent of the evidence to urge that the conduct in question was taken in a reasonable, good faith belief that it was proper and in such instances the evidence so discovered should not be kept from the trier of fact if otherwise admissible. This section is necessary to identify the characteristics of evidence which will be admissible in a court of law. This section does not address or attempt to prescribe court procedure.

Subsection 4 of the statute makes clear that the public policy thus announced was to require evidence to be submitted to the trier of facts if the conduct of the officer seizing the evidence "was taken in a reasonable good faith belief that it was proper." This act was the legislative reaction to recent federal decisions in which a good faith exception to the exclusionary rule was established by judicial decision.

In United States v. Williams, 622 F.2d 830, 840, (5th Cir. 1980) the Fifth Circuit refused to exclude evidence where

> "it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized."

The court recognized that the exclusionary rule exists to deter willful or flagrant actions by police, not reasonable, good faith ones. After an in-depth analysis of the need for a good faith exception to the exclusionary rule, the Williams court held (Reporter, p. 846, 847):

> Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the court so finds, it shall not apply the exclusionary rule to the evidence.

The newly enacted Colorado statute adopts this doctrine in statutory form.

The good faith of Officer Freeman in seizing the television set and video game, and in arresting the defendant affirmatively appears in this case. He is a police officer with 21 years experience on the police department. He knew the procedures followed by professional burglars, who usually enter dwellings at a time when the occupants are not home. He was asked why he did not arrest the defendant at once upon arrival at the scene. His answer was:

> "Well, at that time I didn't feel I had probable cause to arrest him for anything.

Q. And why is it that at that time you felt you did not have probable cause.
A. Because -well, because I didn't know where the information was coming from that we had received from the District 3 station that he was possibly a burglar. He was just a man on the street with a T.V. set."

In Brinegar v. United States, 338 U.S. 160, 175, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879, 1890 (1949), this Court stated:

> In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical, they are the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians act.

Within the meaning of this quotation, the citizen Mrs. Bergan was qualified as a "reasonable and prudent" person. She had no hesitancy in concluding that a crime had been committed. Upon the basis of what she saw -- "the factual and practical considerations of every day life" -- she called the police to report a crime.

Only after Mrs. Bergan identified herself as the person who had reported to the police the conduct which she believed established the commission of a crime, did Officer Freeman arrest defendant:

> When I saw that I had the person Officer Ortiz was talking to on

> the phone, then I felt I was safe enough to go ahead and place him under arrest.

It is undisputed that before the television and the video game were seized and before the defendant was taken into custody to police headquarters, Mrs. Bergan had made a full report to the police concerning her observation of defendant's actions.

It is apparent from the foregoing that the seizure of the evidence and the arrest of defendant took place under a good faith belief by the arresting officer that he was authorized to do so.

In refusing to apply §16-3-308 to the instant case, the Colorado Supreme Court declared (Reporter, pp. 950-951):

> A "good faith mistake" under the statute consists of "a reasonable judgmental error concerning the existence of facts which if true would be sufficient to constitute probable cause." Section 16-3-308 (2)(a). C.R.S. 1973 (1982 Cum. Supp.). The mistake in this case does not center upon a misperception of an existing fact but upon a mistaken judgment of law--that is, the mistaken judgment by the officer that the facts known to him were sufficient to warrant a full custodial arrest of the defendant.

Here, the officer made a judgment regarding probable cause to arrest, i.e.,

that reasonable grounds existed to believe that a crime had been committed and that the defendant committed it. The officer was convinced that he had probable cause to arrest.

The Colorado Supreme Court did not find that the officer had erred with regard to the facts. Rather, the court held that the officer made "a mistaken judgment of law" when he believed the facts to be sufficient to support defendant's arrest.

The People assert that the Colorado Supreme Court's suppression of the evidence in this case conflicts with applicable decisions of this Court pertaining to effectuating Fourth Amendment rights by invoking the exclusionary rule. As the Court declared in United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974):

> The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim:
>
> * * *
>
> Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures:
>
> * * *
>
> In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights

> generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.
> 414 U.S. at 619-620

Even the threshold requirement of standing is not met, because the undisputed evidence is that the items seized from respondent were stolen; and, the circumstances of respondent's possession preclude his having any legitimate expectation of privacy in the stolen property. See Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978).

Moreover, the facts of this case as stated in the opinion, Exhibit A, are themselves convincing testament against imposing the harsh sanction of suppression. The Calandra court, supra, stated that the exclusionary rule "has been restricted to those areas where its remedial objectives are most efficaciously served." 414 U.S. 338, 348, 94 S.Ct. 613, 620, 38 L.Ed.2d 561. In the case at bar, the prompt response of police to the concerned citizen's call, the brief questions to respondent which elicited suspicious answers, and the nonviolent arrest of respondent with the goods that he had just stolen do not equate with police conduct that should be deterred. The Colorado Supreme Court's application of the exclusionary rule to suppress the stolen goods, under the

circumstances here, conflicts with decisions of this Court, E.g. United States v. Payner, 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980), where the Court declared:

> Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury. 447 U.S. 734, 100 S.Ct. 2445.

Further, the People assert that the Colorado statute's provision for a good faith exception to the exclusionary rule is consistent with, and indeed reflects, this Court's expressed views concerning that rule.

Finally, the People respectfully submit that the state court's suppression of the evidence in this case is not only legally incorrect, but is a mechanistic application of the exclusionary rule which undermines the waning public confidence in the criminal justice system. The public response to the state court's Quintero opinion was substantial, both citizen calls and news media reports. A column in the Sunday edition of The Denver Post has been selected to include here as Appendix E to this petition. The column is a colloquial yet eloquent statement of the commonsense view of the exclusionary rule--a view that counsel

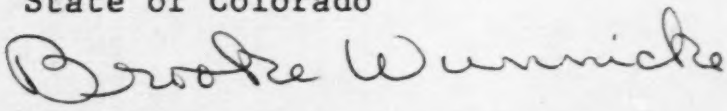
advocates the law can constitutionally share with the public.

In sum, the purpose of the exclusionary rule is to deter willful or flagrant actions by police, not reasonable good-faith police conduct. "Where the reason for the rule ceases, its application must cease also." United States v. Williams, supra.

Petitioner, the People of the State of Colorado, ask this Court to grant certiorari in the case at bar to resolve whether the Fourth Amendment permits the exclusionary rule to be modified when applied to an undisputed good faith seizure of stolen property.

Respectfully submitted,

NORMAN S. EARLY, JR.
District Attorney
Second Judicial District
State of Colorado



/s/ Brooke Wunnicke
BROOKE WUNNICKE
Chief Appellate Deputy District Attorney
(Admitted to this Court on
April 29, 1958)

CERTIFICATE OF SERVICE

I do hereby certify that on the 19th day of April, 1983, I placed in the United States mail, postage prepaid and properly sealed and addressed, a copy of the foregoing Petition for Writ of Certiorari to:

DAVID VELA
Colorado State Public Defender
THOMAS M. VAN CLEAVE, III
Deputy State Public Defender
1575 Sherman Street
Denver, Colorado 80203

Brooke Wunnicke

EXHIBIT "A"

IN THE SUPREME COURT OF COLORADO
NO. 82SA174

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellant,

v.

FIDEL QUINTERO,
Defendant-Appellee.

INTERLOCUTORY APPEAL FROM THE DISTRICT COURT, CITY AND COUNTY OF DENVER, HONORABLE RAYMOND D. JONES, JUDGE

EN BANC RULING AFFIRMED

Dale Tooley, District Attorney
O. Otto Moore, Assistant District Attorney
Brooke Wunnicke, Chief Appellate Deputy District Attorney
Attorneys for Plaintiff-Appellant

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Thomas M. Van Cleave, III, Deputy State Public Defender
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JUSTICE ERICKSON delivered the Opinion of the Court
JUSTICE ROVIRA dissented and filed opinion

This is an interlocutory appeal by the prosecution from an order suppressing evidence seized incident to the arrest of defendant, Fidel Quintero, and from the order setting aside his conviction of second degree burglary, section 18-4-203, C.R.S. 1973 (1978 Repl. Vol. 8 and 1982 Cum.Supp.), and ordering that the defendant be granted a new trial.

The defendant waived a jury trial and was tried to the court. The court elected to consider the evidence offered at the trial for both the purpose of determining guilt and to resolve the issues relating to the defendant's motion to suppress the evidence that was seized at the time of his arrest. After the court heard the evidence, the court found the defendant guilty of second degree burglary and denied the motion to suppress. Thereafter, when the motion for a new trial was filed, the court granted the motion to suppress and ordered a new trial because of our opinion in People v. Schreyer, 640 P.2d 1147 (Colo. 1982). We affirm.

I.

On September 29, 1981, at 12:45 p.m., Darlene Bergan was sweeping the porch of her

home at 691 South Vine Street in Denver. It was a hot day and the temperature was in the 80 degree range or above that. Darlene Bergan's house is located adjacent to the bus stop at the corner of Exposition and Vine. She saw a man walking on the opposite side of the street and watched him go up on the porch of the house and stand at the front door for approximately twenty seconds, and then saw him stand at the front window so that he could peer into the front of the house for approximately the same amount of time. He then left the porch and proceeded north and appeared to be looking at the windows on the side of the house. He then walked in a northerly direction on Vine Street, stopped at another house, and then could not be seen by Mrs. Bergan. He was wearing a short sleeve shirt and appeared to be watching Mrs. Bergan. She next saw him at 1:45 p.m. while he was standing at a bus stop next to her house. He had taken off his shirt and had used the shirt to cover a television set. He paced nervously and was trying to thumb a ride or hitchhike while waiting for the bus to arrive. Mrs. Bergan thought he looked quite "antsey" and called the police. The

police radio dispatcher reported that a possible burglary suspect was at the corner of Exposition and Vine.

Officer Freeman, a twenty-one year police veteran, was the first to respond and arrived approximately five minutes after the call was made. He asked Quintero for identification and Quintero had none. Other officers who arrived at the scene assisted in the investigation. Quintero claimed that he had bought the television set from someone in the neighborhood for $100 and was trying to go home with it. He was in an undershirt and had brown wool gloves in his back pocket which were found in a "pat down" search for weapons. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). While he was being questioned, Mrs. Bergan made herself known to the officers as the woman who had called the police and reported what she had seen. However, she did not tell the police officers what she had seen before the arrest was made. After Mrs. Bergan identified herself, Quintero was arrested and searched. Under the shirt the police found the television set and a video game. The police also found $140 in cash, f e rings (including two class rings bearing different

initials and class years), and some ladies jewelry in Quintero's pants pockets when he was searched at the police station.

After the arrest was made, the officers checked the neighborhood and were unable to determine that a burglary had occurred. Later that day, however, the owners of a house one block south of Mrs. Bergan's reported that their house had been burglarized and that a television set and a video game had been stolen. The television set and video game that were in the possession of Quintero when he was arrested were identified as the items taken in the burglary. It was approximately five hours after Quintero was arrested that the police learned that the items taken were obtained in the burglary.

II.

Probable cause to arrest exists when the facts and circumstances within an officer's knowledge are sufficient to support a reasonable belief that a crime has been committed by the person arrested. People v. Vigil, 198 Colo. 185, 597 P.2d 567 (1979); People v. Gonzales, 186 Colo. 48, 525 P.2d 1139 (1974); People v. Lucero, 174 Colo. 278,

483 P.2d 968 (1971). Evidence in plain view can be relied upon to establish probable cause. People v. McGahey, 179 Colo. 401, 500 P.2d 977 (1972). The totality of the facts considered as a whole can constitute probable cause even though no one fact, viewed alone, constitutes probable cause. People v. Eichelberger, 620 P.2d 1067 (Colo. 1980).

The arresting officer in this case believed that probable cause existed to arrest Quintero. At the time the arrest was made, the police knew that Quintero was a stranger to the neighborhood, and that he claimed that he had purchased a television set from someone in the neighborhood. They also knew that he had attempted to cover the television set and the video game with his shirt. He had no identification, but no evidence existed to establish that a crime had been committed. Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). The police did not learn who the owners of the television set and the video game were until more than five hours after they arrested Quintero. Suspicion does not amount to probable cause and an analysis of the facts requires us to reach the same

conclusion which we reached in People v. Schreyer, 640 P.2d 1147 (Colo. 1982). Moreover, the house where Mrs. Bergan observed Quintero was not the house which was burglarized.

III.

The lack of probable cause to arrest cannot be remedied by resort to the good faith exception or the inevitable discovery rule. The dissenting views of Justice White in Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), would craft a good faith exception for the exclusionary rule whenever a police officer reasonably and in good faith believes his conduct comports with existing law. The majority of the United States Supreme Court to date, however, has refused to recognize this good faith exception. See Taylor v. Alabama, ___ U.S. ___, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982). Given such refusal, it would be inappropriate for this court to alter established Fourth Amendment doctrine by approving such an exception at this time.

We recognize that the General Assembly enacted a statute in 1981 which renders evidence admissible when seized as a result

of the "good faith mistake." Section 16-3-308, C.R.S. 1973 (1982 Cum. Supp.). The statutory definition of "the good faith mistake" is narrower than a good faith exception espoused by Justice White. A "good faith mistake" under the statute consists of "a reasonable judgmental error concerning the existence of facts which if true would be sufficient to constitute probable cause." Section 16-3-308(2)(a), C.R.S. 1973 (1982 Cum. Supp.). The mistake in this case does not center upon a misperception of an existing fact but upon a mistaken judgment of law -- that is, the mistaken judgment by the officer that the facts known to him were sufficient to warrant a full custodial arrest of the defendant. Thus, section 16-3-308 has no application in this case.

There is no basis in the record for application of the inevitable discovery rule to support the defendant's arrest. The prosecution did not rely upon that rule in imposing the initial suppression motion, nor did it raise the rule in its brief as a basis for reversing the trial court's suppression order. This failure is no doubt attributable to the total lack of concrete evidence in the

record to support the application of the rule to the facts of the case. Indeed, the only reasonable inference from the evidence is that the arresting officer recorded the serial number on the television set after the defendant had been arrested and taken to the station house. In contrast to the fact situation in Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977), where an ongoing search for a homicide victim's body had already been in progress and was continuing simultaneously with and independently of the defendant's illegal interrogation, there is no evidence of independent investigatory measures here. The record lacks even a hint of an independent route by which the serial number of the television could have been constitutionally obtained. To remand the case for a hearing under these circumstances would transform the inevitable discovery rule into a vehicle for upholding police conduct based upon an officer's hindsight appraisal of what constitutionally proper course of conduct he "could" have followed. The focus of the inevitable discovery rule should not be upon what the arresting officer "might" or "could"

have done had he not erroneously concluded that probable cause to arrest existed. Rather, the central focus should be on what investigatory measures necessarily or inevitably would have been taken regardless of the officer's decision to arrest.

Accordingly, we affirm the ruling of the trial court suppressing the evidence and ordering that a new trial be granted.

JUSTICE ROVIRA, dissenting:

I respectfully dissent.

The fourth amendment to the United States Constitution assures to the people the right to be secure in their persons, houses, papers and effects, and free from unreasonable searches and seizures. Among other things, this amendment requires that arrests be based upon probable cause--that is, the circumstances must be such as to support a reasonable belief that a crime has been committed by the person arrested. We must not lose sight of the fact that a probable cause determination involves a common-sense question: what would reasonable people believe under the circumstances?

In People v. Weinert, 174 Colo. 71, 74, 482 P.2d 103, 104-05 (1971), we said:

"'[P]robable cause exists where the facts and circumstances within the arresting officers' knowledge are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. In dealing with probable cause, as the very name, implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' Lucero v. People, 165 Colo. 315, 438 P.2d 693, cert. den. 393 U.S. 893 [89 S.Ct. 217, 21 L.Ed.2d 173]...."

It is an unfortunate fact, but a fact nonetheless, that a high incidence of residential burglaries is one of the realities of modern urban life. The circumstances surrounding the incident here in question were highly suggestive of a recent burglary. In my view, the officers would have been derelict in their duty had they merely released Quintero. As Justice White observed in his dissenting opinion in Stone v. Powell, 428 U.S. 465, 539, 96 S. Ct. 3037, 3073, 49 L.Ed.2d 1067 (1976):

"Making the arrest in such circumstances is precisely what the community expects the police officer to do. Neither officers nor judges issuing arrest warrants need delay apprehension of the suspect until unquestioned proof

against him has accumulated. The officer may be shirking his duty if he does so."

There is no suggestion here that the officers were not acting in good faith. In fact, one officer testified that after stopping Quintero and questioning him Quintero was not arrested immediately because the police did not feel that they had probable cause. It was only after Mrs. Bergan identified herself as the caller that the defendant was placed under arrest. The information provided by the citizen who lived in the area and who observed the defendant prowling around a neighbor's home, in conjunction with the suspect explanation given by the defendant, caused the police to have sufficient facts to believe that a crime had been committed. See People v. Mathis, 189 Colo. 534, 542 P.2d 1296 (1975); People v. Glaubman, 175 Colo. 41, 485 P.2d 711 (1971). I cannot conclude that the actions of the police were anything but reasonable under circumstances that warranted the conclusion that an offense had been committed. The fourth amendment requires no more.

Conceding for the sake of argument that

the police officers did not have probable cause to arrest when they did, I would remand to the trial court with directions to consider the applicability of the "inevitable discovery rule" to the facts of this case.

In Brewer v. Williams, 430 U.S. 387, 406-07 n. 12, 97 S. Ct. 1232, 1243 n. 12, 5, L.Ed.2d 424 (1977), the United States Supreme Court, after concluding that statements made by the defendant about the location of a body were unconstitutionally obtained, stated as follows:

> "While neither Williams' incriminating statements themselves nor any testimony describing his having led the police to the victim's body can constitutionally be admitted into evidence, evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams."

When the case was returned to the state courts, it was determined that given the procedures being used to search for the body the police would have found it in three to five hours without Williams' statement. State v. Williams, 285 N.W.2d 248 (Iowa 1979), cert. denied, 446 U.S. 921 100 S.Ct. 1859, 64 L.Ed.2d 277 (1980).

In adopting the inevitable discovery rule, the Iowa court adopted a two-part test for its application. See W. LaFave, Search and Seizure 11.4 at 620-28 (1978). First, the doctrine may be used only when the police have not acted in bad faith to accelerate the discovery of the evidence. Second, the state must prove that the evidence would have been found without the illegal activity and must prove how it would have been found. The state has the burden of showing these two elements by a preponderance of the evidence.

The New York Court of Appeals has also adopted the rule, emphasizing that literal inevitability of discovery is not required. Rather, what is required is a "very high degree of probability that the evidence in question would have been obtained independently of the tainted source." People v. Payton, 45 N.Y.2d 300, 380 N.E.2d 224, 230-31, 408 N.Y.S.2d 395, 402 (1978), rev'd on other grounds, 445 U.S. 573, 100 S. Ct. 1371, 63 L.Ed.2d 639 (1980). A number of other courts have also adopted the rule. See, e.g., State v. Phelps, 297 N.W.2d 769 (N.D. 1980); State v. Beede, 119 N.H. 620, 406 A.2d 125 (1979), cert. denied, 445 U.S. 967, 100 S.Ct. 1659, 64 L.Ed.2d 244 (1980); United States v. Bienvenue, 632 F.2d 910 (1st Cir. 1980).

Here the trial court suppressed not only the television set, but also any testimony by the police officers concerning the serial number of the set found with Quintero. I believe that on remand the People should be permitted to introduce evidence whether the serial number would have been discovered without the illegal arrest and, if so, how it would have been found.

The application of the exclusionary rule to the facts of this case demonstrates why the rule has come under increasing attack and why courts and legislatures have recognized alternatives such as the "good faith" exception.

In 1981 the Colorado legislature adopted a statute providing that evidence otherwise admissible in criminal proceedings shall not be suppressed if the evidence was seized by the police as a result of a good-faith mistake or of a technical violation. See section 16-3-308, C.R.S. 1973 (1982 Supp. to 1978 Repl. Vol. 8).

The good-faith rule adopted by the Colorado legislature closely follows the views of Justice White in his dissent in Stone v. Powell, supra, where he stated that

the exclusionary rule should be "modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good faith belief that his conduct comported with existing law and having reasonable grounds for his belief." See United States v. Williams, 622 F.2d 830 (5th Cir. 1980), cert. denied, 449 U.S. 1127, 101 S.Ct. 946, 67 L.Ed.2d 114 (1981) (upheld seizure of evidence by officers in good faith and in the reasonable though mistaken belief that they are authorized to do so).

The United States Supreme Court has to date not recognized the good faith exception. See Taylor v. Alabama, ___ U.S. ___, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982). However, in Illinois v. Gates, the court requested the parties to address the question whether the exclusionary rule should to any extent be modified, "so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment." ___ U.S. ___, 103 S.Ct. 436, 74 L.Ed.2d (1982).

Application of the "good faith" exception has not been foreclosed by a

definitive ruling of the United States Supreme Court. Accordingly, I would apply the "good faith" exception to the case at hand and thus reverse the trial court's order suppressing the evidence which established the defendant's guilt beyond a reasonable doubt.

EXHIBIT "B"

COLORADO APPELLATE RULES 4.1
INTERLOCUTORY APPEALS
IN CRIMINAL CASES

* * * *

(g) Disposition of Cause. No oral argument shall be permitted except when ordered by the court. The decision of the court shall be by written opinion, copies of which shall be transmitted by the clerk of the court by mail to the trial judge and to one attorney on each side of the case. No petition for rehearing shall accompany said opinion.

EXHIBIT "C"

SUPREME COURT, STATE OF COLORADO

NO. 82 SA174

MOTION TO VACATE REMITTITUR

THE PEOPLE OF THE STATE OF COLORADO
Plaintiff-Appellant,

vs.

FIDEL QUINTERO,
Defendant-Appellee.

The People of the State of Colorado, by and through Norman S. Early, Jr., District Attorney within and for the Second Judicial District, and by his duly appointed Deputy, Brooke Wunnicke, and moves to vacate the remittitur ordered in this case on January 31 and received February 2, 1983.

As grounds for this motion, the People allege that:

1. C.A.R. 4.1(g) prohibits a petition for rehearing on interlocutory appeals in criminal cases.

2. The opinion of the Supreme Court of Colorado, issued January 31, 1983, is, therefore, a final judgment.

3. The People of the State of Colorado intend to seek review of that final judgment

by filing a Petition for Writ of Certiorari in the Supreme Court of the United States.

4. This matter should not, therefore, be remitted to the trial court until completion of review by the Supreme Court of the United States.

WHEREFORE, the People ask this court to vacate its order of remittitur in this matter, issued January 31 and received February 2, 1983.

Respectfully submitted February 16, 1983.

NORMAN S. EARLY, JR.
District Attorney
Second Judicial District
State of Colorado

BY: _____
BROOKE WUNNICKE, Reg. No. 4854
Chief Appellate Deputy
District Attorney

924 West Colfax Avenue
Denver, Colorado 80204
Telephone: 575-5933

CERTIFICATE OF MAILING

I do hereby certify that on February 16, 1983, I deposited a true and complete copy of the foregoing Motion to Vacate Remittitur, properly addressed in the U.S. mail to:

THOMAS M. VAN CLEAVE, III, Esq.
1575 Sherman Street
Denver, CO 80203

BROOKE WUNNICKE

_____

EXHIBIT "D"

SUPREME COURT, STATE OF COLORADO

Case No. 82 SA 174

INTERLOCUTORY APPEAL FROM THE DISTRICT COURT, CITY AND COUNTY OF DENVER

ORDER OF COURT

- -

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellant,

vs.

FIDEL QUINTERO,
Defendant-Appellee.

Upon consideration of the Motion to Vacate Remittitur filed by counsel for Plaintiff-Appellant herein, and now being sufficiently advised in the premises,

It Is This Day Ordered that said Motion shall be, and the same hereby is, Denied.

BY THE COURT, EN BANC, FEBRUARY 22, 1983

CC: Brooke Wunnicke
Chief Appellate Deputy
District Attorney
West Side Court Building

Thomas M. Van Cleave, III
Deputy State Public Defender

EXHIBIT "E"

DENVER POST
February 6, 1983
Article by Tom Gavin

Burglars Find Friend Indeed

Let me first establish my credentials.

My credentials are that I have a tendency to see things from the underside, having been peering up from there for sometime now. As often as not I side with the black sheep in the flock, the debtor in hock, the prisoner in the dock.

But Jehoshaphat!, what is going on?

Causing this hoo-haw is the Colorado Supreme Court.

The Colorado Supreme Court is acting oddly.

The Colorado Supreme Court has walked off and left its good sense somewhere.

You know me, I try not to criticize judges, not being a candidate for public office. Besides, we who never know when we might be up on charges tend to placate, not upset judges. Judges aren't permitted to read or use a Sony Walkman during a long trial so the choice becomes listening to the evidence or brooding over old slights, and, well, I just don't want to risk it.

But the Colorado Supreme Court seems to have ruled that it isn't cricket to arrest burglars who have not quite gotten out of the neighborhood with the boodle.

And I — The Understanding One, Mr. Permissive, America's Pushover — am in danger of sputtering myself into sick bay.

What happened:

On Sept. 29, 1981, a South Denver woman looked out and saw a stranger peering into a neighbor's windows. She watched as he went to another house, then disappeared from view.

When she next saw him he was standing at a nearby bus stop. He'd removed his shirt and draped it over a video game and a television set he was carrying. He seemed nervous. The resident called police.

RTD service being what it is, the man was still at the bus stop when officers arrived.

The witness came out, identified herself and related what she'd seen. The man insisted he'd purchased the items in the neighborhood, but he was arrested. A jail search produced $140 in cash and jewelry.

Five hours later a burglary report was made. Items reported stolen matched those in the suspect's possession.

Yes, perfect.

Open and shut.

A family's home is burgled while they're away and before they even know it's happened the criminal is behind bars and the loot retrieved.

The very essence of Neighborhood Watch programs.

We all go away feeling fine and even RTD's happy-go-lucky scheduling comes in for a round of applause, right?

You know there are times I wonder about you. You really should begin paying more attention. Happy endings are few in the real world.

Officers, our very own Supreme Court decided, did not have sufficient reason to arrest the burglary suspect, not then knowing conclusively that a burglary had actually occurred. Suspicion, our very own Supreme Court ruled, is not sufficient reason for arrest.

Don't look at me.

One Supreme Court justice disagreed. Only one. His name is Rovira, Luis Rovira.

Residential burglaries are a fact of life, Justice Rovira said, and the circumstances of the incident were highly suggestive of a recent burglary and sufficient to support a reasonable belief that a crime had been committed by the person arrested.

Yes. Indeed.

Quote

"If the police had done anything else, they'd be sharply criticized for dereliction of duty. This is a Catch-22 if I've ever seen one." — Dale Tooley

Office-Supreme Court, U.S.
FILED
SEP 12 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1711

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THE STATE OF COLORADO,

PETITIONER,

v.

FIDEL QUINTERO,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 20, 1983
CERTIORARI GRANTED JUNE 27, 1983

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Note: A copy of the pertinent opinion of the Colorado Supreme Court, People v. Quintero, 657 P.2d 948 (Colo. 1983), was appended as Exhibit A to the petition for certiorari. As permitted by Rule 30.1, the opinion is not reproduced again in the joint appendix.

No. 82-1711

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THE STATE OF COLORADO,

PETITIONER,

v.

FIDEL QUINTERO,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF COLORADO

JOINT APPENDIX

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
10-2-81	1) INFORMATION - one count of

DATE	PROCEEDINGS
	second degree burglary, §18-4-203, C.R.S. 1973, charging that "FIDEL QUINTERO, did unlawfully, feloniously and knowingly break an entrance into and enter and remain unlawfully in the dwelling of DAVID and CAROL ROGERS, located at 791 S. Vine Street, with the intent to commit therein the crime of Theft; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of Colorado."
11-17-81	2) ARRAIGNMENT before District Judge Raymond Dean Jones. Plea of Not Guilty
11-25-81	20) Motion to Suppress Search of September 29, 1981

2-8-82 22) MINUTES OF PROCEEDINGS before District Judge Raymond Dean Jones - Suppression hearing begins

3-29-82 31) MINUTES OF PROCEEDINGS before District Judge Raymond Dean Jones - Defendant Quintero's Motion to Suppress Evidence granted

4-7-82 34) NOTICE OF INTERLOCUTORY APPEAL

4-7-82 35) DESIGNATION OF CONTENTS OF RECORD ON INTERLOCUTORY APPEAL

Pertinent Portions of the Transcript of the Suppression Hearing

DISTRICT COURT, DENVER COUNTY, COLORADO

Case No. 81CR2157, Courtroom 16

REPORTER'S TRANSCRIPT

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

v.

FIDEL QUINTERO,

Defendant.

This matter came on for hearing on Monday, February 8, 1982, before the HONORABLE RAYMOND DEAN JONES, Judge of the District Court.

FOR THE PLAINTIFF: DAVID HECKENBACH, Deputy District Attorney

FOR THE DEFENDANT: DAVID VELA and FREDRICO ALVAREZ, Attorneys at Law

[Prefatory Note: The parties have agreed, as allowed by Rule 30.2, that the portions of the transcript of the suppression hearing reproduced verbatim in this joint appendix comprise all the testimony relevant to the issue presented for determination by the Court.]

DARLENE BERGAN

called as a witness in behalf of the People, first being duly sworn, testified upon her oath as follows:

DIRECT EXAMINATION

BY MR. HECKENBACH:

Q Ma'am, would you please state your full name and then spell your last name for the record?

A Darlene Bergan, B-e-r-g-a-n.

[12] Q What I would like to do is ask you to remove the microphone from its holder and just pull it up towards you, and it should slide out, if you could hold it just like a finger holds the microphone and everything.

Ms. Bergan, where do you reside?

A 691 South Vine.

Q How long have you lived there?

A Approximately three and a half years.

Q And who do you live there with?

A My husband and son.

Q And how old is your son?

A Twelve months.

THE COURT: Since it's to the Court, I'll just inquire, is there a question here as to location? Was the testimony that the residence was 691 South Vine?

MR. HECKENBACH: Yes, Your Honor. This is a neighbor of the victims.

THE COURT: Very well.

MR. HECKENBACH: This is not the -- she does not reside at the address of the victims.

THE COURT: Very well. You may proceed, sir.

MR. HECKENBACH: All right. Thank you.

Q (By Mr. Heckenbach) Ms. Bergan, I would like to direct your attention to September 29, 1981. Were you at home on or during the daylight hours of that day?

[13] A Yes, I was.

Q Was that unusual for you to be home during the day at that period of time?

A No, I'm home with my son.

Q Your son would have been about what?

A Seven, seven and a half months.

Q Seven months or so?

A (Witness nodded her head.)

Q Do you recall observing, say, about 12:45 in the afternoon, observing anything that struck you as unusual?

A Yes. I was out on the front porch sweeping and I saw a gentleman at the corner, right at the corner of Exposition and South Vine.

Q All right, just a second. How far is Exposition and South Vine from your house?

A I live right on the corner.

Q Okay.

A I saw him cross Vine.

Q Directly across from you?

A Yes.

Q All right.

A And he walked north up the street and he looked at me and then went back to his walking, and he walked up to the third house from the corner and went up on the porch and stood at the front door for probably twenty seconds. It's [14] hard to say. And then he went to the front window and stood there for approximately the same amount of time.

Q Which way was he facing when he stood at the window?

A Facing the door and also the window.

Q Okay.

A Then he went back to the front door, stood there momentarily, then he left the porch and proceeded up the street north and looked at the side of the house.

Q Of the same house?

A Of the same house, right.

Q Okay.

A At that point in time, I thought he was acting a little strange, and I went in the house and started observing him from the northwest bedroom in our house. And I watched him proceed up the street north again, and he got about -- oh, midway up the block and then crossed over diagonally, and then he stepped out of my view then.

Q At any time before you went into the house, did this person look at you or look in your direction?

A He did when he started walking up the street initially, when he was -- when I first noticed him almost at the corner, he looked over at me and then, I don't recall him looking at me again.

Q Is the individual that you saw across the street [15] looking at you, looking at the house, is he in the courtroom today?

A Yes, he is.

Q All right. For the record, I would like you to point out where he is seated and what he is wearing.

A He is seated right here, and he is in a green shirt and green slacks.

Q Okay.

MR. HECKENBACH: Your Honor, may the record reflect the identification of the Defendant, Fidel Quintero?

THE COURT: Yes, the record will so reflect.

MR. HECKENBACH: Thank you.

Q (By Mr. Heckenbach) Now, when you first observed this, you know, about what time was it when you first observed him?

A Around quarter of one, about 12:45.

Q About quarter to one?

A Yeah.

Q At any time later that day, did you see him again?

A Yes, I saw him about 1:45, and he was standing at the bus stop and he had taken off his shirt and had it thrown over what looked to be a television set -- what was a television set.

[16] Q Okay. What I would like you to do is to approach that diagram, and I think the microphone will reach, and if you could just draw a rough sketch of the position of your house, the position of the house that you saw the Defendant standing in front of, and where the bus stop is in relation to both.

(Whereupon, People's Exhibit A was marked for purposes of identification.)

THE WITNESS: Okay. This is my house.

THE COURT: Ma'am, will you stand just a little further over?

THE WITNESS: How is that?

THE COURT: Okay.

Q (by Mr. Heckenbach) Would you now -- this is one thing we have to keep in mind, is that later on when the record is read back, we need to have what you have pointed out as your house marked in some way, so why don't you put in "M" for "My" in the box you have indicated as your house.

Okay. Thank you.

A This is my house right on the corner, and here's the bus stop, which was directly in front of my front door. This is the third house from the corner, which is where I saw him go up on the porch and stand there for a while.

Q Do you know the address of that house?

A No, I don't.

[17] Q Would you put a "3" in it to indicate third house from the corner, and that would be across the street from your house; right?

A Right.

Q Okay. And after you saw him -- now, which direction is north?

A This way (indicating).

Q Okay. And you have marked that with an arrow with an "N" over it?

You saw him walk north, after the house?

A Yes.

Q Now, where was he? Which side? I take it you marked that one street as Exposition?

A Right.

A Right.

Q Which side of Exposition is the bus stop?

A It's on my side, which would be the north side of -- north side of Exposition.

Q How far did you observe him from the inside of your house?

A You mean --

Q Looking out a window.

A When are you saying? I mean --

Q Sorry. When he was at the bus stop.

[18] A Yes, I was in the house.

Q How far was it, about, from the window that you looked out to where he was standing at the bus stop?

A Maybe about 15 feet.

Q And what do you recall he was wearing -- I'm sorry. You can have your seat now.

When you first saw him across the street, do you recall what he was wearing?

A Yes. He had a pair of kind of a beige pair of pants on and a cream-colored shirt, short-sleeved.

Q And when you saw him at the bus stop, what was he wearing?

A He had on slacks and he had the shirt off, but he had like an old-man undershirt.

Q Like a sleeveless type?

A Well, yeah, but the short-sleeved shirt was thrown over the television.

Q Thrown over the TV. How big was the TV?

A Probably about a 19-inch.

Q Okay. Now, after you saw that, did you call the police?

A Yes.

Q All right. And do you know what time you called the police?

A Approximately 1:25, as soon as I spotted him.

[19] Q How do you remember that it was 1:45?[sic]

A Well, because he was waiting to catch the bus and I was thinking he is going to catch the bus and the police will not have arrived. So, I had kept on watching the clock, frantically watching for the bus, thinking it was going to show up, and it was 1:30 when the police showed up.

Q Was the Defendant doing anything besides standing there?

A Yeah, you could tell he was a little antsey about the bus coming. So, he walked out in the middle of the street and looked down from where the bus should be coming from, and tried thumbing a ride, hitchhiking and just a little anxious it seemed.

Q Did you see him with the television set prior to his standing at the bus stop?

A No.

Q Okay. Was there anyone else standing at the bus stop?

A No.

Q Had you ever seen the Defendant before?

A Never.

Q Never seen him in your neighborhood?

A Never.

Q You said the police got there five minutes after you called him?

[20] A Right.

Q Okay. And did you watch what the police did when they came?

A Yes, I did.

Q What did you observe?

A Well, the officer approached him and asked him his name.

Q You could hear this?

A Yes.

Q Okay.

A It was hot out, so the doors and windows were open.

Q Okay.

A Asked his name, and I could not hear his response. And then, I think -- I'm not sure what transpired there, but then the officer took some things out of his pockets, like a pair of gloves.

Q Out of whose pocket?

A Out of Mr. Quintero's.

Q When you say that the officer took a pair of gloves --

MR. VELA: Your Honor, I don't think she said gloves.

THE WITNESS: I did.

MR. VELA: I'm sorry.

[21] THE COURT: Would you continue, sir?

Q (By Mr. Heckenbach) When the officer took the gloves out of the back pocket, could you see the gloves before the officer reached in? Were they

hanging out or all the way out of the back pocket?

A I don't remember that.

Q But you did recall seeing a pair of gloves?

A Yes.

Q Taken by the officer?

A Yes.

Q What kind of day was this?

A Extremely warm out. I would say it's in the 80's.

Q I would like to go back to when you phoned the police, and do you recall where you called the police and what number you reached or what location you were trying to reach?

A I called the central dispatcher. It's some downtown number.

Q Okay.

A I'm not even sure of the number now, but --

Q What did you tell the police when you called them?

A I told them that there was an individual standing at the bus stop with a television, that I had seen in the neighborhood [22] earlier. They asked me if I had seen him in the neighborhood before, and I said no. They did not ask my name and -- let's see, what else. I'm not sure whether they asked for a description at that time or not. I was almost frantic, so --

Q Did you --

A They asked me for my location, obviously.

Q Sure. What did you tell them about -- if anything, about seeing him in the neighborhood before?

* * * *

[23] A I said I had never seen the man in the neighborhood, up until that day.

Q Did you tell the police you had seen him earlier?

A I'm not really sure whether that entered into it.

[24] Q Okay. How far away from the TV set was the Defendant standing most of the time while --

A He was standing right next to it.

Q Next to it? And how much of the TV set did the shirt cover?

A Well, it was thrown over the top, so it definitely covered all of the top. I'm not sure whether it covered the sides or not.

Q But could you still tell it was a TV set?

A Oh, yes.

Q Earlier, when you saw him at 12:45, did he have a TV set?

A No, he didn't.

* * * *

[25] (Whereupon, People's Exhibit A was admitted into evidence.)

THE COURT: I do just have a brief voir dire for the Court's own understanding.

EXAMINATION

BY THE COURT:

Q Ma'am, the house that is represented by "M," what is the address?

A 691 South Vine.

Q All right. And what is the address of the house marked "3"?

A I don't know.

Q Okay.

[26] A All I know is it's the third house from the corner.

Q The third house north of Exposition on Vine?

A Right, on the east side of the street.

Q All right. And is yours the first house north of Exposition?

A Right.

* * * *

[Cross-examination of witness Bergan omitted.]

* * * *

[38] ROMASB FREEMAN

called as a witness in behalf of the People, first being duly sworn, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. HECKENBACH:

Q Sir, would you please state your full name and spell your last name for the record?

A Romasb, R-o-m-a-s-b, Freeman, F-r-e-e-m-a-n.

Q Thank you. How are you employed, sir?

A Denver Police Department.

Q And how long have you been with the Denver Police Department?

A 21 years.

[39] Q What is your current assignment?

A Juvenile detective, Juvenile Division.

Q And what was your assignment back on September 29th, 1981?

A I was assigned to Patrol Division, District 3.

Q And on that 29th day of September, 1981, did you have occasion to respond to the approximate location of Vine and Exposition?

A Yes, sir, I did.

Q Okay. Do you recall about what time it was that you responded to that location?

A It was in the afternoon. I would have to look at the notes, but I think

it was somewhere around -- it was in the afternoon.

Q Okay. That's all right. Why did you respond to that location, sir?

A I was in the District 3 police substation when the clerk, Officer Ortiz, received a phone call stating that there was a possible burglary.

* * * *

[41] Q (By Mr. Heckenbach) Would you tell us what Officer Ortiz told you while you were at the substation?

A He related to me that he received a phone call and that there was a possible burglary suspect in the vicinity of Vine and Exposition. I went and got in my police car and drove to that location.

Q All right. Before going on, did he tell you anything else about anything about the individual?

A Yes. He says there was a man standing on the corner with a T-shirt on

at the bus stop, with a TV at his feet with a shirt over it.

Q Okay.

A As I responded to that location, I observed a man standing at the bus stop, and it was in the northwest corner on Exposition and Vine.

Q Is this individual that you saw standing at the bus stop, in the courtroom today?

A Yes, sir, he is.

Q All right. For the record, would you please identify where he is seated and what he is wearing?

A He is at the Defendant's table, wearing the green shirt.

[42] Q Thank you. From which direction did you come to that intersection?

A I think I come right down Vine Street from the 1600 block south of University.

Q So, you came north on Vine?

A Right.

Q To Exposition?

A Right.

Q Okay. And what did you observe when you first saw the Defendant?

A He was standing there at the bus stop, which he was standing right behind with the TV set in front of him, with a shirt draped over the set as if it was just thrown over the TV set and he had to be waiting for a bus.

Q And was there anyone else standing at that bus stop?

A There was no one else in the neighborhood. The neighborhood was vacant of any pedestrians.

Q What kind of weather was it that day?

A It was clear, in about the 80's. 80 degrees or above. It was quite warm.

Q Now, after you saw the Defendant standing there, what did you do?

[43] A I pulled up and stopped, to where I had him in my vision, got out of the car, asked him for identification.

Q What was his response?

A He told me he had no identification, and he spoke in very broken English and told me his name; Fidel Quintero.

Q But he could not produce any identification?

A No. He told me he had no identification.

Q Now, after he told you he had no identification, what did you next do?

A I told Mr. Quintero that -- no, first of all, I asked him where he had gotten the TV set, where was he coming from with the TV set.

Q What was his response?

A He told me that he had boughten [sic] the TV from a person within the neighborhood for $100, and he was trying to go home with it.

Q Did he indicate where he lived?

A No. Like I say, he spoke very broken English and I got his name, and about that time, then I started getting cover in from other police officers.

Q At the time that you asked him where he got the TV set, did you have handcuffs on him?

A No.

Q Okay.

[44] Was he under arrest?

A Not at that moment.

Q Had you informed him he was under arrest?

A Not at that moment.

Q And why did you not arrest him?

A Well, at that time I didn't feel I had probable cause to arrest him for anything.

Q Okay. And why is it that at that time you felt you did not have probable cause?

A Because -- well, because I didn't know where the information was coming from that we had received from the District 3 station that he was possibly a burglar. He was just a man in the street with a TV set.

Q Did you subsequently, or at some point in time, come into contact with Darlene Bergan?

A Yeah. Sergeant King responded about that time, also a Detective Wessels and Comstock came on the scene. I was -- I told Detective -- Sergeant King, I didn't know where the information had come from, and the witness, being right -- the house here,

her front door was approximately 25 feet away, overhearing me asking where the information came from, she made herself known.

Q Did you speak to her?

A Yes, sir. I spoke to her and she wrote a [45] statement out for me.

Q Do you recall what the substance of that statement was?

A She told me she had observed the Defendant in the area earlier and he was walking, having no property on him, that he had went to a house on Vine Street there in the 600 block south and knocked to the door, and then he had went to another house and she lost sight of him. And in a short time later she observed him walking down the street with a TV set, placed the TV set there at the bus stop, waiting for the bus. Meanwhile, he was trying to hitchhike also while he was waiting for a bus.

Q Detective, do you recall whether the -- do you recall when, at what point, the Defendant was placed under arrest?

A Shortly right -- when Sergeant King drove up and then the lady made herself known, then I placed him under arrest and put the handcuffs on him.

Q Are you the one that handcuffed him?

A Yes. I placed him in the police car.

Q Did you inform him he was under arrest?

A I informed him he was under arrest, and verbally gave him his rights.

Q Okay. Was that before or after you spoke with [46] Ms. Bergan?

A That was at the time Ms. Bergan made herself known, that she was the person that had called the police. Then, I placed him under arrest.

Q What information did she provide you before you placed him under arrest?

A She had provided me no information at that point.

Q At that point, she had just said she was the one?

A Yes.

Q Okay. Now, did you conduct a search of the Defendant or --

A I gave him a pat-down search.

Q At what point in time was this?

A Just right after I handcuffed him.

Q Okay. And did you discover anything as a result of the pat-down search?

A I found a pair of brown woolen gloves in his right-rear pocket.

Q And did you conduct a search incident to arrest, or did someone else? Do you know?

A No, I didn't search him until after I had placed him under arrest.

[47] Q Did you recover anything else besides the gloves? You, yourself?

A The TV set.

Q Okay. And anything from his person?

A I didn't take no property from his person, other than the gloves.

Q Other than the gloves? Could you -- were the gloves visible, or were they stuck all the way down in his pocket, or were they partially hanging out?

A I didn't even notice the gloves until I patted him down and there was a big lump in his back pocket, and I pulled the gloves out.

Q Okay. You say the shirt was draped over the TV set; correct?

A More or less just thrown over the TV set.

Q Was it spread out or was it kind of like -- how would you describe it

falling over the TV set, the way it hung on the TV?

A It would be -- looked as it a person just threw it over. It wasn't in a straight line, it was kind of spread out.

Q Was there anything underneath the shirt besides the TV?

[48] A There was another -- I think it was a video tape game.

Q Was that visible without removing the shirt, or would you have had to remove the shirt before that would be visible?

A Well, I was watching the Defendant more than anything else at that time, and I was just noticing the TV set because it was big and large, but I was watching him more than the property that was on the ground beside him.

Q You don't know?

A I didn't pay any attention to the video game set until after he was placed under arrest. Then I noticed there was another object on top of the TV.

Q Did you transport the Defendant, or did you -- someone else?

A No, we placed the Defendant in the detective's vehicle, and also the TV in it, and the video set was placed in this car also.

Q Did you give the gloves to the detective?

A Yes.

* * * *

CROSS-EXAMINATION

* * * *

[57] Q Okay. Now, as I recall your testimony, Officer, again on direct examination, she made herself known, and at that point in time you told Mr. Quintero -- advised him he was under arrest, he was handcuffed, placed in the

car, and then Officer -- or yourself, went over and intereviewed Ms. Bergan?

A Right. I interviewed -- excuse me. I interviewed her after I had placed him in handcuffs and placed him in the car.

Q I assume before you put handcuffs on somebody, [58] that's when you pat them down?

A Yes.

Q That's when you removed the gloves from his back pocket?

A That's right.

Q Now, that's enough.

Now, you went over and conferred with Ms. Bergan and talked with her?

You have to say yes or no for the record.

A Yes.

Q Before you talked to Ms. Bergan, Officer Freeman, or even when you were talking to Sergeant King when you left the dispatch substation, when Officer

King got there did you have any report of a recent theft of any TV set in that immediate vicinity?

A No, sir.

THE COURT: Well, perhaps the officer knows what you mean by "recent report," but could you narrow that down?

MR. VELA: Yes, Judge.

Q (By Mr. Vela) Had you received, Officer Freeman, to your knowledge or Officer Ortiz's knowledge, I assume, of any theft of a TV set within the last, say, hour and a half?

A Not in that area, to my knowledge, no.

Q Do you recall -- and I'm maybe asking you to [59] sit back and consider it -- did you have any reports at all, at least from that morning, of any recent thefts of any TV sets, that you can recall?

A Well, I don't work that particular area. I worked the Capitol Hill area at that time, so I just happened to be in the vicinity at the time this transpired.

Q Okay. Fine. Now, my understanding, Officer -- correct me if I'm wrong on this, that after you talked to Ms. Bergan again, that maybe perhaps yourself and other officers checked the rest of the area, the neighborhood area?

A I helped check this immediate area, yes.

Q My understanding, from the police reports, none of the officers, including yourself, found any evidence of any burglary pertaining to the house you examined on that block of Exposition and Vine, to your own best knowledge?

A I know none, no.

* * * *

[61] ROGER A. COMSTOCK

called as a witness in behalf of the People, first being duly sworn, testified upon his oath as follows:

MR. HECKENBACH: Your Honor, before questioning, may I have a few exhibits marked?

THE COURT: Yes. We will go off the record.

(Whereupon, People's Exhibits B and C were marked for purposes of identification.)

DIRECT EXAMINATION

BY MR. HECKENBACH:

Q Sir, would you please state your full name and spell your last name for the record?

A Roger A. Comstock, C-o-m-s-t-o-c-k.

Q Thank you. How are you employed, sir?

A I'm a policeman for the City and County of Denver.

Q How long have you been employed by the Denver Police Department?

A 16 years.

[62] Q What is your current assignment?

A I'm assigned to the Criminal Investigation Division, Burglary and Theft Detail.

Q How long have you had that particular assignment?

A 11 years.

Q Detective Comstock, I would like to direct your attention to September 29, 1981. Did you have occasion to respond to the location of South Vine and Exposition Streets?

A Yes, I did.

Q Was that done in the City and County of Denver, State of Colorado?

A Yes, it was, and is.

Q Do you recall about what time you responded to that location?

A It was approximately 1:45 p.m.

Q What did you observe when you arrived at that location?

A Upon arrival, I observed a police car parked on the north curb of Exposition with a party seated in the back seat; Officer Freeman, Sergeant King standing outside the car.

Q Is the party that you saw in the back seat in the courtroom today?

A Yes, he is.

[63] Q For the record, please identify where he is seated and what he is wearing.

A He is seated at the Defendant's table, in a green shirt, green pants.

Q Thank you.

MR. HECKENBACH: May the record reflect the identification of the Defendant?

THE COURT: Yes, the record will so reflect.

Q (By Mr. Heckenbach) Detective Comstock, I have placed in front of you what has been marked for identification purposes as People's Exhibit B. Can you identify for us what that is?

A Yes. That's a property envelope from our property custodian's office.

Q And are you able to determine whether or not you had, at any time, anything to do with that particular envelope?

A Yes. I filled out the Property Division description on the front.

Q And does it contain -- have you examined the contents of that particular bag today?

A Yes, I have.

Q Okay. And does it contain property that you recovered?

A Property that Officer Freeman and also my [64] partner, Detective Wessels, recovered.

Q Okay. What property, if any, did Officer Freeman give to you at that time?

A A pair of brown wool-type gloves.

Q And did you place those gloves in that bag?

A Yes, I did.

* * * *

Q (By Mr. Heckenbach) Detective, I have handed to you what has been marked as People's Exhibit B-1 and B-2. Can you identify those items, sir?

A Yes. Those were the gloves handed to me by Officer Freeman at the scene of the arrest.

* * * *

[69] Q Detective Comstock, did you also transport to the custodian's office any other property from that location?

A Yes, I did.

A What property was that, sir?

A TV set and an Atari game, and a yellow shirt.

Q Where were those items when you first arrived?

A They were sitting on the ground at the bus stop, along the north curb of Exposition.

Q Okay. And did you place those into the Property Bureau?

A Yes, I did.

Q Now, later on did you have occasion to become the assigned or investigative detective to this case?

A Yes, I did.

* * * *

[70] Q And were you, at some point, informed that this case involved a burglary occurring at 791 South Vine on September 29, 1981?

A Yes, I was assigned the case the next morning.

Q Okay. And have you met the residents or the owners of that property, 791 South Vine?

A Yes, I was.

Q And what are their names?

A David and Carol Rogers.

Q At any time, sir, did you get the property -- I'm sorry -- the TV set and Atari set, did you ask either of those victims, or Mr. and Mrs. Rogers, to respond down to the Property Bureau?

A Yes, I did.

[71] Q And why did you ask them to come down?

A To positively identify the property that was being held.

Q And were they able to do that?

A Yes, they were.

Q Do you know how they were able to tell the property there was theirs?

A The burglary was discovered, and the report was made approximately seven

p.m. on 9/29. At the time the report was made, the officer was unaware that we had recovered the TV set. Mr. Rogers was able to supply the serial number to the TV set, which was listed on the offense report at that time. When I received the investigation of the offense, I looked at the report. The serial number matched the TV set we had recovered the previous day.

Q Okay. So, in other words, the property was recovered before the owners discovered the burglary?

A That's correct.

Q Okay. And did you release the TV set and the Atari game back to Mr. Rogers?

A Yes, I did. It was the only TV set they had in the house.

Q I would like to have you look at People's [72] Exhibit C, and ask if you can identify that?

A Yes, that's -- that was taken out of the property custodian's office at the time the TV set was positively identified and released to Mr. Rogers.

Q Was that -- does that fairly and accurately portray Mr. Rogers and his property?

A Yes, it does.

* * * *

MR. HECKENBACH: I have no further questions, [73] Your Honor. I would offer into evidence, People's Exhibits B, B-1, B-2, and C.

THE COURT: All right.

* * * *

[Cross-examination of witness Comstock omitted.]

[102] CAROL S. ROGERS

called as a witness in behalf of the People, first being duly sworn, testified upon her oath as follows:

DIRECT EXAMINATION

BY MR. HECKENBACH:

Q Ma'am, will you please state your full name and spell your last name for us?

A Carol S. Rogers, R-o-g-e-r-s.

Q Thank you. Are you related to David Rogers?

A Yes, he is my husband.

Q And where do you live, Mrs. Rogers?

A 791 South Vine.

Q About how long have you lived there?

A Since 1972.

Q Mrs. Rogers, I would like to direct your attention to September 29, 1981. Were you at home with your children during the early part of the day?

A During the morning, my little boy was at preschool.

Q Okay. How many children do you have?

A A six-year-old and a four-year-old.

Q Okay. So, who all was home with you during the morning?

[103] A No one.

Q No one?

A Okay. One was in school, one was in preschool. I'm sorry.

Q Now, along about one o'clock in the afternoon, did you leave your house?

A No, I picked up my four-year-old at preschool, and at 11:30 we went to lunch.

Q Um-hum.

A Then, I came back by the house at fifteen till 1:00.

Q Did you go inside your house?

A Yes. I had to get some babysitting co-op.

Q I'm sorry?

A I'm a babysitting co-operative, and I needed to pick up the babysitting

hours so I can pay the girl that was going to babysit my son.

Q When you went into your house at that time, where did you keep that particular item that you went in to get?

A It's in the desk drawer in the dining room.

Q Is that the same room where your TV is located?

A Yes.

Q Did you notice whether or not the TV was there, or whether it wasn't?

[104] A It was there.

Q It was there. About how long did you stay at your house?

A About five minutes. I went to the restroom, then got my cards, and I left.

Q Did you notice anything else unusual about the house?

A No.

Q Okay. You left the house at that time; right?

A At fifteen of one, to take my child to the babysitter.

Q Okay. And where did you go?

A I went to my dentist.

Q Okay. And about what time did you return home, Mrs. Rogers?

A Between 5:00 and 5:15.

Q And when you got home, did you notice anything unusual about your house?

A No. I unlocked the door and I went in, and my children were hungry. It was around suppertime, so we went right to the kitchen to get them something to eat, and I noticed that the radio was pulled out from the wall -- that [105] was in the kitchen -- and the cord was wrapped around the handle. So, that was the first thing I observed. I thought maybe my husband had come home, thought maybe he would like to take the radio someplace.

So, I turned around, my little girl said, "Look, there's the microwave. It's not where it's supposed to be. It's pulled out from the wall." And at that point, I started getting a little scared. I didn't know if someone was in the house or what was going on, so I went back to my little boy's room and I noticed the window fan was on the floor. So then, I thought, well, I still wondered if someone was in the house. I didn't know what to do since the children were there. So, I came back through my bedroom, back to the dining room where my children were, and I told them, "Just stay in the dining room."

Then, I noticed that the TV was gone and the Atari.

Q Did you call the police?

A I called the police the first thing, right after I noticed the TV and

Atari was gone. Then, I called my husband's office to see if he was there.

Q Did he come home?

A He had already left.

Q Did you meet him out in front?

A Yes.

[106] Q You say when you came home from the dentist around five o'clock, whenever it was, you say you unlocked the front door?

A Yes.

Q It was still locked?

A Um-hum.

Q Was there anything else in the house, as far as possible entryways, like windows or doors, that you could tell had been disturbed?

A No, just where the window -- where the window fan was -- the window fan was knocked off the window and the window was still opened.

Q Was that window kept open so that the window fan would be effective?

A Yes. We always used the window fan at night, but our door always locks when you shut it. It automatically locks.

Q Do you need a key to open it from the outside?

A Yes.

Q Do you need a key to open it from the inside?

A No.

Q Would it still automatically lock?

A Yes.

Q On the way out?

A Yes, on the way out.

[107] Q Mrs. Rogers, on that day, did you give anyone permission to enter your home or to steal your TV and Atari set?

A No.

Q Have you ever seen the gentleman to my right here, dressed in green?

A No.

Q Prior to that particular day, you did see him at the preliminary hearing; right?

A Right.

Q Okay. But prior to that preliminary hearing, had you ever seen him?

A No.

Q Have you ever seen him in your neighborhood at all?

A No.

Q Did you give him permission to enter your house?

A No.

MR. HECKENBACH: I have no further questions.

* * * *

MR. HECKENBACH: Your Honor, the People rest.

THE COURT: The People have rested.

[Cross-examination by witness Rogers omitted.]

SUPREME COURT OF THE UNITED STATES

No. 82-1711

Colorado,

Petitioner,

v.

Fidel Quintero

ORDER ALLOWING CERTIORARI.

Filed June 27, 1983.

The petitioner herein for a writ of certiorari to the Supreme Court of the State of Colorado is granted.

No. 82-1711

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

THE STATE OF COLORADO,

Petitioner,

v.

FIDEL QUINTERO,

Respondent.

On Writ of Certiorari to

the Supreme Court of Colorado

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Was the Petition for Writ of Certiorari untimely filed?

2. Whether the Colorado Supreme Court correctly ruled that the warrantless arrest of Respondent without probable cause rendered that arrest invalid and the items seized incident to that arrest inadmissible in evidence?

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No. 82-1711

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

THE STATE OF COLORADO,

Petitioner,

v.

FIDEL QUINTERO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE FACTS

Respondent generally accepts the factual statement in the Petition for Writ of Certiorari, but reserves the right to make corrections or additions where appropriate.

SUMMARY OF THE ARGUMENT

1. The decision of the Colorado Supreme Court upon which this Petition for Writ of Certiorari is based was announced on January 31, 1983. Under applicable Colorado procedural rules no petition for rehearing was permitted, and the decision became final on that date. Thus the State's Petition for Writ of Certiorari, filed on April 20, 1983, was untimely and need not be considered by this Court. Rule 20.1, Supreme Court Rules.

2. There was no probable cause to arrest Respondent. At the time of his arrest, the arresting officer had no knowledge or reason to believe that Respondent had committed a crime or even that a crime had been committed. The officer was acting solely on a report of suspicious activity. Thus there was no constitutional basis for the arrest. Nor was there a "good faith mistake" which would operate to negate the exclusion of the items seized from Respondent incident to the arrest. Accordingly the Colorado Supreme Court properly affirmed the trial court's order suppressing those items.

ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI WAS UNTIMELY FILED AND SHOULD NOT BE CONSIDERED BY THIS COURT.

People v. Quintero, 647 P.2d 948 (Colo. 1983), was decided on January 31, 1983. Since the State had brought the appeal pursuant to Rule 4.1, Colorado Appellate Rules (1980 Repl. Vol. 1B), as an "interlocutory appeal," no petition for rehearing was permitted, and the remittitur was issued contemporaneously with the opinion. The time for filing a petition for certiorari with this Court thus began running on that date and expired sixty days later on April, 1, 1983. Rule 20.1, Supreme Court Rules. Since the State's Petition for Writ of Certiorari was not filed until April 20th, the Petition should be denied.[1]

The State has made some effort to show that it filed a Motion to Vacate Remittitur on or about February 16, 1983, which motion was denied on February 22nd. It is not clear what the purpose of this showing is. Rule 20.4 refers only to a petition for rehearing. The Motion to Vacate Remittitur thus must be considered superflous and cannot be considered as an extension of the period prescribed in Rule 20.1. Thus, the petition for writ of certiorari was untimely filed and should be denied. Cf. Allegrucci v. United States, 372 U.S. 954 (1963).

II. THE COLORADO SUPREME COURT PROPERLY UPHELD THE TRIAL COURT'S ORDER SUPPRESSING THE EVIDENCE SEIZED PURSUANT TO THE ILLEGAL ARREST OF THE RESPONDENT.

At the time he was dispatched to investigate Mrs. Bergan's call to the police, Officer Freeman, the arresting officer, knew only that there was

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[1]Rule 20.6 of the Supreme Court Rules provides for an application for an extension of time for filing the petition. However, the State apparently did not avail itself of this procedure to request such an extension. Nor has the State proferred any reasons for the untimely filing of the petition. See Schact v. United States, 398 U.S. 58 (1970).

a possible burglary suspect in the vicinity of Vine and Exposition. (Transcript at p. 41) Upon arriving at that location he observed a man, later identified as the Respondent, standing at a bus stop with a television at his feet. (Transcript at p. 42) Respondent gave his name, Fidel Quintero, but indicated that he had no identification. (Transcript at p. 43) When Mrs. Bergan made herself known as the person who had made the report to the police, but before she had told Officer Freeman the details of her observations,[2] Officer Freeman placed Respondent under arrest. (Transcript, at p. 45)

From the facts of this case it is clear that probable cause to arrest Respondent did not exist. Mrs. Bergan's observation of Respondent walking up to the porch of one of the houses in her neighborhood and later seeing him standing at a bus stop with a television set on the ground was, at best, a

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[2]In its Petition the State stated that "[i]t is undisputed that before the television and the video game were seized and before the defendant was taken into custody to police headquarters, Mrs. Bergan had made a full report to police concerning her observation of defendant's actions." (Petition at p. 12) This statement is erroneous. Officer Freeman testified as follows:

> Q Detective, do you recall whether the—do you recall when, at what point, the Defendant was placed under arrest?
>
> A Shortly right—when Sergeant King drove up and then the lady made herself known, then I placed him under arrest and put the handcuffs on him.
>
> • • • •
>
> Q Okay. Was that before or after you spoke with Mrs. Bergan?
>
> A That was at the time Mrs. Bergan made herself known, that she was the person that had called the police. Then, I placed him under arrest.
>
> Q What information did she provide you before you placed him under arrest?
>
> A She had provided me with no information at that point.

(Transcript at p. 46)

vague suspicion that Respondent was involved in criminal activity. Respondents' inability to provide identification added little to that suspicion. Brown v. Texas, 443 U.S. 47 (1979). See Kolander v. Lawson. ___ U.S. ___ (33 Crim. L. Rptr. 3063, May 4, 1983). Thus, as the Colorado Supreme Court ruled, none of the above circumstances, taken either by themselves or collectively, amounted to anything approaching probable cause to arrest the Respondent. Cf. Whiteley v. Warden, Wyoming State Penitentiary, 401 U.S. 560 (1971).

The court also correctly concluded that the evidence seized incidental to this invalid arrest was properly suppressed by the trial court. Section 16-3-308, Colorado Revised Statutes (1978 Repl. Vol. 8), which excepts from the exclusionary rule evidence seized as a result of a good-faith mistake is, by its own definition, inapplicable to the facts of this case. Section 16-3-308(a)(2) defines a "good faith mistake" as "a reasonable judgmental error concerning the existence of facts which if true would be sufficient to constitute probable cause." Since, as the court noted, no facts were misperceived by Officer Freeman—rather the mistake invoked a judgmental determination that he had probable cause to make an arrest—the Colorado statute is inapplicable. In any event, the question of whether the Colorado Supreme Court correctly interpreted section 16-3-308 is not an appropriate one for this Court to determine. Wainwright v. Sykes, 433 U.S. 72 (1977).

Finally, the State contends that the Colorado Supreme Court's declining to adopt a good-faith mistake exception to the exclusionary rule as a matter of Fourth Amendment doctrine was erroneous. In so contending, the State is apparently relying upon the good-faith mistake/technical violation exception to the exclusionary rule initially formulated in United States v. Williams, 622 F.2d 830 (5th Cir. 1980). See also Stone v. Powell, 428 U.S. 465 (1976) (White, J., dissenting). That exception is inapplicable here.

As noted by the Colorado Supreme Court, this Court has not yet adopted such an exception as a matter of Fourth Amendment doctrine. See

Taylor v. Alabama, ___ U.S. ___, 102 S. Ct. 2664 (1982). This exception is especially inapplicable where, as here, the mistake was not factual but rather a judgmental error as to the existence of probable cause. Taylor v. Alabama, supra; See also Ybarra v. Illinois, 444 U.S. 85 (1979). The State does not contend that Officer Freeman misperceived any facts. Officer Freeman had no information that a crime had been committed and thus had no belief that Respondent had committed a crime.[3] Rather, as the Colorado Court found, Officer Freeman made a judgmental error of law. He felt he had probable cause to arrest the Respondent when, in fact, there was no factual basis to reasonably support such action. Thus, a good-faith mistake exception to the exclusionary rule should not be applied to the facts of this case.

CONCLUSION

The petition for writ of certiorari in this case should not be granted because, based on the facts of this case, the decision of the Colorado Supreme Court is substantially correct and does not present any significant

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[3] In its brief, the State states:

> The good faith of officer Freeman in seizing the television set and video game, and in arresting the defendant affirmatively appears in this case. He is a police officer with 21 years experience on the police department. He knew the procedures followed by professional burglars, who usually enter dwellings at a time when the occupants are not home.

(Petition at p. 10)

In fact, other than stating that he had had been with the Denver Police Department for 21 years, Officer Freeman gave no testimony as to his knowledge, or lack of it, regarding the nature and occurrence of burglaries based on his experience.

federal questions of law. Further, the State has failed to comply with this Court's rules regarding the timeliness for filing the petition.

Respectfully submitted,

DAVID F. VELA
Colorado State Public Defender

THOMAS M. VAN CLEAVE, III
Deputy State Public Defender

DORIAN E. WELCH
A Member of the Bar of this Court
Deputy State Public Defender

ATTORNEYS FOR RESPONDENT
1575 Sherman Street, #718
Denver, Colorado 80203
(303) 866-2865

CERTIFICATE OF MAILING

I, Dorian E. Welch, a member of the Bar of the Supreme Court of the United States and counsel of record for Fidel Quintero, respondent herein, certify that on May 12, 1983, I deposited in the United States Mails, postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, the foregoing Brief in Opposition to Petition for Writ of Certiorari and Motion for Leave to Proceed in Forma Pauperis.

DORIAN E. WELCH

CERTIFICATE OF SERVICE

I, Dorian E. Welch, a member of the Bar of the Supreme Court of the United States and counsel of record for Fidel Quintero, respondent herein, certify that on May 13, 1983, I served one copy of the attached Brief in Opposition to Petition for Writ of Certiorari on the Honorable Norman S. Early, Jr., District Attorney for the Second Judicial District, State of Colorado and Ms. Brooke Wunnicke, Chief Appellate District Attorney, counsel for Petitioner, by depositing same in the United States Mail, postage prepaid, addressed as follows:

The Honorable Norman S. Early, Jr.
District Attorney

Ms. Brooke Wunnicke
Chief Appellate District Attorney

West Side Court Building
924 West Colfax Avenue
Denver, Colorado 80204

Dorian E. Welch

Office-Supreme Court, U.S.
FILED
MAY 17 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1711

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THE STATE OF COLORADO,

Petitioner,

v.

FIDEL QUINTERO,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Fidel Quintero, respondent herein, respectfully moves the Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 46 of this Court, and to file herein his Brief in Opposition to the Petition for Writ of Certiorari previously filed by the State of Colorado. The Brief in Opposition to the Petition for Writ of Certiorari is presented herewith for filing.

The Affidavit of respondent in support of this motion is filed herewith.

Dated: May 13, 1983.

Respectfully submitted,

DAVID F. VELA
Colorado State Public Defender

THOMAS M. VAN CLEAVE, III
Deputy State Public Defender

DORIAN E. WELCH
A Member of the Bar of this Court
Deputy State Public Defender

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1575 Sherman Street
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No. 82-1711

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THE STATE OF COLORADO,

Petitioner,

v.

FIDEL QUINTERO,

Respondent.

STATE OF COLORADO)
CITY AND COUNTY OF DENVER)

AFFIDAVIT

Fidel Quintero, being duly sworn and upon oath deposes and says:

1. He is the Respondent in the above-entitled action and makes this affidavit in support of his Motion for Leave to Proceed in Forma Pauperis herein.

2. That he is presently incarcerated in the Denver County Jail and, because of his proverty, is unable to pay the fees and costs of this proceeding or give security therefor.

3. That he has been indigent throughout the proceedings in the State of Colorado and has been represented by the Colorado State Public Defender at all stages of these proceedings.

FIDEL QUINTERO

FIDEL QUINTERO

Subscribed and sworn to before me this 13th day of May, 1983.

My commission expires August 22, 1984.

Notary Public

CERTIFICATE OF SERVICE

I, Dorian E. Welch, a member of the Bar of the Supreme Court of the United States and counsel of record for Fidel Quintero, respondent herein, certify that on May 13, 1983, I served one copy of the attached Motion to Proceed in Forma Pauperis, and Affidavit in support thereof on the Honorable Norman S. Early, Jr., District Attorney for the Second Judicial District, State of Colorado, and Ms. Brooke Wunnicke, Chief Appellate District Attorney, counsel for Petitioner, by depositing same in the United States Mail, postage prepaid, addressed as follows:

The Honorable Norman S. Early, Jr.
District Attorney

Ms. Brooke Wunnicke
Chief Appellate District Attorney

West Side Court Building
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Denver, Colorado 80204

Dorian E. Welch

Office-Supreme Court, U.S.
FILED
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No. 82-1711

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

THE STATE OF COLORADO,

PETITIONER,

v.

FIDEL QUINTERO,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

PETITIONER'S OPENING BRIEF ON THE MERITS

NORMAN S. EARLY, JR.
District Attorney
O. OTTO MOORE
Assistant District Attorney
BROOKE WUNNICKE
Chief Appellate Deputy District Attorney, counsel of record in this cause and a member of the Bar of the Supreme Court of the United States

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QUESTION

Whether the Colorado Supreme Court has misinterpreted the Fourth Amendment and has mistakenly applied the exclusionary rule to the seizure of stolen property, which was made incident to an arrest that police reasonably and in good faith believed to be supported by probable cause.

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No. 82-1711

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THE STATE OF COLORADO,

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v.

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RESPONDENT.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

PETITIONER'S OPENING BRIEF ON THE MERITS

CITATION TO OPINION BELOW
People v. Quintero,
657 P.2d 948 (Colo. 1983)

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Court is invoked on two grounds:

(1) The Court has jurisdiction in all cases arising under the federal

constitution. U.S. CONST., art. III., §2, I.(1); and,

(2) The Court has jurisdiction "When a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court." Sup. Ct. R. 17.1(c).

The petition for a writ of certiorari was filed within 60 days of the date of the Colorado Supreme Court's order giving final effect to its interlocutory opinion, Sup. Ct. R. 20(1); and, on June 27, 1983, this Court granted the petition for a writ of certiorari.

CONSTITUTIONAL PROVISION INVOLVED

Pursuant to Sup. Ct. R. 34.1(f), the sole provision involved in this case

is set forth verbatim in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated;... U.S. CONST., amend. IV.

STATEMENT OF THE CASE

On September 29, 1981, at 12:45 p.m., Darlene Bergan was sweeping her porch at 691 South Vine Street, Denver, Colorado (J.A. 5, 7). She saw a man, whom she later identified as Fidel Quintero ("the defendant"), (J.A. 10), go up on the porch of a house across the street from her and peer into the front door and the front window for approximately twenty seconds each (J.A. 8). He then left the porch, walked north, and looked at the side of the house (J.A. 9). Mrs. Bergan thought that the man was acting "a little strange," and watched him continue

walking north until he crossed the street and disappeared from her sight. (J.A. 9).

Mrs. Bergan saw the defendant again about 40 minutes later, when he was standing at the bus stop in front of her house (J.A. 11). He had taken off his short-sleeved shirt and had thrown it over about a 19" television set (J.A. 11, 15). Defendant was "a little antsey" and was anxiously trying to hitchhike while waiting for the bus (J.A. 16). Mrs. Bergan had never before seen the defendant, in the neighborhood or elsewhere (J.A. 17).

Mrs. Bergan called the police (J.A. 15). The police radio dispatcher reported a possible burglary suspect at the bus stop at Vine and Exposition, wearing a T-shirt and with a television set covered with a shirt (J.A. 25, 26).

Officer Freeman, a Denver police officer for 21 years (J.A. 24), arrived within 5 minutes of Mrs. Bergan's call. (J.A. 16, 17). The officer saw the defendant in his undershirt, waiting by the bus stop and a television set in front of him with a shirt draped over it (J.A. 27). When the officer asked him for identification, the defendant had none and claimed that he had paid someone in the neighborhood $100 for the television set. (J.A. 28, 29).

When other officers arrived within 2-3 minutes, Mrs. Bergan made herself known as the person who had called them and she reported what she had seen. (J.A. 30, 31). After Mrs. Bergan identified herself, the defendant was arrested and searched. (J.A. 32). Although it was a hot day, with the temperature 80 degrees or above, (J.A. 27), the officers found a pair of brown

wool gloves in defendant's back pocket. (J.A. 33). Under the shirt was a television set and video game. (J.A. 34, 35).

Carol S. Rogers, who resided in the home in the next block south of Mrs. Bergans home, (J.A. 49) testified that she left her residence at about 12:50 p.m., and at that time the television set was in the house. (J.A. 50, 51). As already stated, this television set was in the possession of the defendant, at the bus stop, at 1:25 p.m. (J.A. 11, 15).

Later that day, David and Carol Rogers reported to police that their house at 791 South Vine, Denver, Colorado, had been burglarized and a television set and video game stolen. (J.A. 52-54). They identified the television set and video game recovered

from the defendant as the items taken in the burglary. (J.A. 46).

The defendant was charged by information with second degree burglary. (J.A. 1, 2). In a trial to the court, the court considered the trial evidence to determine both guilt and defendant's motion to suppress evidence seized at the time of his arrest. The trial court found defendant guilty of second degree burglary and denied the motion to suppress. Thereafter, the trial court granted defendant's motion for new trial and his motion to suppress.

The prosecution took an interlocutory appeal from the trial court's ruling to the Colorado Supreme Court, specifically requesting a review of the trial court's suppression of the television set, video game and gloves. The Colorado Supreme Court affirmed the

ruling of the trial court. People v. Quintero, 657 P.2d 948 (Colo. 1983).

SUMMARY OF ARGUMENT

The Supreme Court of the State of Colorado has mistakenly construed the Fourth Amendment to the federal constitution, in its application of the exclusionary rule to the facts of this case. Although the Court has expressly recognized that its Fourth Amendment decisions over the years point in differing directions, and differ in emphasis, certain constants are manifest throughout all of them. The opinion of the Colorado Supreme Court in People v. Quintero, 657 P.2d 948 (Colo. 1983) conflicts with those constants for the reasons here stated.

1. The Colorado opinion fails to consider the purpose and effect of the Fourth Amendment.

For over 100 years this Court has held that what the United States Constitution forbids is not all searches and seizures.

The record here before this Court negates an "unreasonable" search and seizure in this case. The undisputed facts establish a "reasonable" seizure of highly incriminating evidence.

The police had a reasonable, good faith belief that the seizure was lawful because made as an incident to arrest.

No constitutional norm requires the seizure to be converted retroactively to an "unreasonable" one by the opinion of the Colorado Supreme Court, issued several months after the arrest, in which the divided court ruled that the police made "a mistaken judgment of law" in deciding that they had probable cause to arrest.

2. The purposes for which the exclusionary rule was adopted are not served by the rule's application to the facts of this case.

By excluding evidence obtained in violation of a defendant's Fourth Amendment rights, a two-fold purpose was to be served: (1) to deter unlawful police conduct; and, (2) to promote judicial integrity. The undisputed circumstances involved in the instant seizure do not qualify realistically as "unlawful police conduct" requiring deterrence.

The imperative of judicial integrity would not be offended by admission of the evidence seized, because here the police reasonably believed in good faith that their conduct was in accordance with the law. Under these circumstances, deliberate exclusion of the truth from the

fact-finding process vitiates judicial integrity.

3. No indiscriminate application of the exclusionary rule is authorized by law, which requires a balancing of public and private interests.

This Court has disapproved indiscriminate application of the exclusionary rule, and it has consistently recognized that its inflexible application to all evidence obtained illegally would intolerably impede the truth-finding function of the trier of fact. The rule has never been interpreted by this Court to prohibit introduction of illegally seized evidence in all proceedings or against all persons. Instead, the Court has found the balancing process to be implicit in a determination of whether the exclusionary rule applies.

When the exclusionary rule is viewed stripped to its reason for existence, petitioner avers that the precedents of this Court refute that the exclusionary rule was ever contemplated to be applicable to the kind of circumstances presented by the case at bar.

The position of petitioner, the People of the State of Colorado, is this: where, as here, police officers acted reasonably and in good faith when they arrested the defendant, the exclusionary rule serves no efficacious purpose. Petitioner submits that this position is fair and feasible. The "reasonable person" is a long accepted and pervasive legal concept, with well-settled modes of evidentiary proof. "Good faith" is also no legal innovation and is provable, as is any other state of mind, including the mens rea of

criminal law. In asking for reversal of People v. Quintero, petitioner seeks no new rule of law, but instead urges the Court to declare that application of the exclusionary rule here conflicts with the Court's decisions.

ARGUMENT

THE COLORADO SUPREME COURT HAS MISINTERPRETED THE FOURTH AMENDMENT AND HAS MISTAKENLY APPLIED THE EXCLUSIONARY RULE TO THE SEIZURE OF STOLEN PROPERTY, WHICH WAS MADE INCIDENT TO AN ARREST THAT POLICE REASONABLY AND IN GOOD FAITH BELIEVED TO BE SUPPORTED BY PROBABLE CAUSE.

In this brief, petitioner assumes, arguendo, the position that there was an insufficient showing of probable cause to arrest respondent Fidel Quintero. Although the finding of no probable cause presented a highly debatable question as evidenced by the strong dissent of Justice Rovira of the Supreme

Court of Colorado, petitioner raises no issue with regard thereto in this proceeding. Petitioner also assumes, arguendo, that respondent had standing to raise the issue of Fourth Amendment rights, another debatable question.

The thrust of the opinion of the Supreme Court of Colorado is clearly stated in the following quotation from that opinion (found at page 24 of the petition for certiorari):

> The majority of the United States Supreme Court to date, however, has refused to recognize this good faith exception. See Taylor v. Alabama ___ U.S. ___, 102 S.Ct. 2554, 73 L.Ed.2d 314 (1982). Given such refusal, it would be inappropriate for this court to alter established Fourth Amendment doctrine by approving such an exception at this time.

Thus, the question here presented arises solely upon the defendant's asserted violation of Fourth Amendment rights. It involves only a

determination of this question: whether the exclusionary rule should be applied to prevent introduction of evidence taken as an incident to the arrest of a person under circumstances which the arresting officer reasonably and in good faith believed sufficient to give him probable cause to make the arrest.

I

THE SEIZURE UNDER EXAMINATION WAS NOT AN UNREASONABLE SEIZURE WITHIN THE CONTEMPLATION OF THE FOURTH AMENDMENT.

As stated above, the Fourth Amendment is designed to protect the People from "unreasonable" searches and seizures. Boyd v. United States, 116 U.S. 616; Weeks v. United States, 232 U.S. 383. In determining whether the seizure involved in this case was an "unreasonable" one, we must give consideration to the undisputed facts

and circumstances which were present at the time of the seizure. We briefly summarize the pertinent circumstances as follows:

On a hot summer day, a Denver woman saw a stranger in the neighborhood go to a neighbor's house, where he stood at the front door, next peered in the front window, and then went to the side of the house. He then disappeared from her view. When she saw him about 40 minutes later, he was standing at a nearby bus stop. He had taken off his shirt, which he had draped over a video game and a 19-inch television set. The woman described him as "antsey" and anxiously trying to "thumb a ride." She called the police.

When the police came, they asked the man -- later identified as Fidel Quintero -- for identification and he had none. He claimed that he had bought

the television set in the neighborhood for a $100.

The police did not arrest the defendant until Ms. Bergan identified herself as the person supplying the information to the police, which resulted in the arrival of Officer Freeman, and immediately thereafter Ms. Bergan gave him the details of her observations of defendant. These observations caused her, as a reasonable person, to believe that a burglary had been committed and she was fearful that the burglar at the bus stop would get away before the police arrived.

Police officers did not know which residence in the neighborhood had been burglarized until four or five hours after the arrest, but Officer Freeman had twenty-one years experience as a policeman, during which time he must have acquired a knowledge concerning the

activities of burglars. Law-abiding citizens do not carry woolen gloves in their hip pockets in plus 80 degree weather. However, woolen gloves leave no fingerprints. The conduct of Quintero observed by Ms. Bergan and related by her to the police was consistent with the known conduct of burglars who do not enter residence property, knowing in advance that the persons residing therein are home.

There can be no question whatever concerning the fact that Officer Freeman reasonably and in good faith believed that his conduct was consonant with existing law.

The Supreme Court of Colorado acknowledged that Officer Freeman "believed that probable cause existed to arrest Quintero." (Page 23 of Petition for Certiorari).

At the time Fidel Quintero filed his motion to suppress the evidence seized by the officers, he then stood before a court of justice as a person who indisputably was a burglar and a thief, who was caught "red handed" with the loot taken from a burglary committed by him within a few minutes prior to his arrest.

The reasonable good faith belief of Officer Freeman, i.e., that the seizure of the television set, the Atari game device, and the woolen gloves, was consonant with existing law, evinces that this seizure was reasonable, notwithstanding the fact that several months thereafter a judicial finding was entered to the effect that there was no probable cause to arrest Quintero.

II

THE PURPOSES FOR WHICH THE EXCLUSIONARY RULE WAS ADOPTED

ARE NOT SERVED BY THE RULE'S APPLICATION TO THE FACTS OF THIS CASE.

The exclusionary rule, by excluding in a criminal prosecution evidence obtained in violation of a defendant's Fourth Amendment rights, was designed to serve a two-fold purpose: to deter unlawful police conduct, Terry v. Ohio, 392 U.S. 1, 12; and, to promote judicial integrity. Elkins v. United States, 364 U.S. 206, 222.

In this case, the police reasonably thought that they had probable cause to arrest, with the concomitant good faith belief that the seizure incident to that arrest was thereby lawful. These circumstances do not qualify realistically as "unlawful police conduct" requiring deterrence.

The imperative of judicial integrity would not be offended by admission of the evidence seized,

because the police reasonably believed in good faith that their conduct was in accordance with the law. United States v. Peltier, 422 U.S. 531, 537-538. Under these circumstances, deliberate exclusion of the truth from the fact-finding process vitiates judicial integrity.

In evaluating the effectiveness of the first-mentioned justification for the exclusionary rule, deterrence of unlawful police conduct, as applied to the uncontradicted facts of this case, petitioner respectfully directs this Court's attention to a few of the many pertinent decisions of this Court.

In Stone v. Powell, 428 U.S. 465, 479, the Court stated that

> ...the exclusion of illegally seized evidence is simply a prophylactic devise intended generally to deter Fourth Amendment violations by law enforcement officers.

In that opinion the Court further stated at 486:

> The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights.

From Michigan v. Tucker, 417 U.S. 433, 447, petitioner quotes:

> The 'deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

By this action petitioner does not seek to bring about the abolishment of the exclusionary rule, notwithstanding our firm conviction that experience has

established the fact that it has failed to bring about the "deterrence of police conduct that violates Fourth Amendment rights" which this Court has stated was the "primary justification" for its existence.

After many years experience in the prosecution of criminal cases, involving countless motions to suppress evidence, petitioner's counsel appreciate the impact of the following statement of this Court taken from Stone v. Powell, supra, 428 U.S. at 486:

> But despite the broad deterrent purpose of the exclusionary rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons. As in the case of any remedial device, "the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."

If ever in the history of criminal justice there was a case in which application of the rule should be "restricted to those areas where its remedial objectives" are efficaciously served, the Quintero case vividly illustrates the need for such "restriction." We here urge this Court to give recognition to the fact that Officer Freeman reasonably and in good faith believed that he had probable cause to arrest respondent Quintero and, therefore, the "primary justification" for the rule is non-existent in this case. The "remedial objectives" of the rule could not possibly be served in any degree whatever.

If this Court were to hold to the contrary, Quintero, the burglar and the thief, caught with the loot from his crime within a few minutes of his criminal act, goes free, to the utter

amazement of the citizenry of the State of Colorado. Application of the exclusionary rule to the facts of this case, and the wide publicity connected therewith, has already contributed substantially to the waning public confidence in the integrity of the criminal justice system. Petitioner respectfully submits that this is a matter proper for consideration in determining when, and under what circumstances, the rule should be applied. As stated by Mr. Justice Powell in Stone v. Powell, supra, 428 U.S. at 490, 491:

> Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice.

Footnote 30 in connection with this quotation cites Oaks, Ethics, Morality and Professional Responsibility, 1975 B.Y.U.L. Rev. 591, 596, as follows:

> I am criticizing, not our concern with procedures, but our preoccupation, in which we may lose sight of the fact that our procedures are not the ultimate goals of our legal system. Our goals are truth and justice, and procedures are but means to these ends. . . .
> Truth and justice are ultimate values, so understood by our people, and the law and the legal profession will not be worthy of public respect and loyalty if we allow our attention to be diverted from these goals.

With reference to the second justification for the exclusionary rule, which has been mentioned in a few decisions of this Court, i.e., "the imperative of judicial integrity", we believe that its importance as a basis for suppressing highly incriminating evidence has been substantially

discounted, if not completely eliminated. Consistent with its views relating to the primary justification for the exclusionary rule this Court, in recent decisions has declined to utilize the "imperative of judicial integrity" in situations where it would achieve no deterrence, as in the instant case.

The following cases illustrate the failure of this Court to use "the imperative of judicial integrity" to justify suppression of evidence in matters involving no deterrent effect.

In United States v. Peltier, 422 U.S. 531, no retroactive effect was ordered in connection with a search and seizure ruling, for the reason that suppression would serve no deterrent purpose.

In Desist v. United States, 394 U.S. 244, n. 24, the Court stated:

> [W]e simply decline to extend the court-made exclusionary rule to cases in which its deterrent purpose would not be served.

In United States v. Calandra, 414 U.S. 338, any "incremental deterrent effect" did not require the extension of the exclusionary rule to proceedings before the grand jury.

In Stone v. Powell, supra, any "incremental deterrent effect" of permitting search and seizure claims to be raised on federal collateral review of state convictions was "outweighed by the acknowledged costs to other values vital to a rational system of criminal justice."

To like effect is United States v. Janis, 428 U.S. 433, as well as Alderman v. United States, 394 U.S. 165.

The "imperative of judicial integrity" could have been cited as justification for extension of the

exclusionary rule to the different situations presented in the cases above cited. But this Court did not do so.

The case of Quintero is one in which neither deterrence nor the so-called "imperative of judicial integrity" could possibly be "efficaciously served" by application of the rule of exclusion.

This Court stated in United States v. Peltier, 422 U.S. 531, at 537, that where:

> ...law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the "imperative of judicial integrity" is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner.

III

NO INDISCRIMINATE APPLICATION OF THE EXCLUSIONARY RULE IS

AUTHORIZED BY LAW, WHICH REQUIRES A BALANCING OF PUBLIC AND PRIVATE INTERESTS.

One of the constants appearing over the years in this Court's opinions dealing with the exclusionary rule is that the rule should not be indiscriminately applied in all proceedings or against all persons. E.g., Terry v. Ohio, 392 U.S. 1, 15; United States v. Payner, 447 U.S. 727, 734. This Court has consistently recognized that inflexible application of the exclusionary sanction to all evidence obtained illegally would intolerably impede the truth-finding function of the trier of the facts.

In United States v. Payner, 447 U.S. 727, 734 is the following pertinent language:

> But our cases also show that these unexceptional principles do not command the exclusion

> of evidence in every case of illegality. Instead, they must be weighed against the considerable harm that would flow from indiscriminate application of an exclusionary rule.
>
> Thus, the exclusionary rule "has been restricted to those areas where its remedial objectives are most efficaciously served." (Citing United States v. Calandra, 414 U.S. 338.)

For example, after balancing the interests involved, the Court has refused to extend the exclusionary rule to use of unlawfully seized evidence used to impeach a defendant who testified in his own defense, Walder v. United States, 347 U.S. 62; grand jury proceedings, United States v. Calandra, 414 U.S 338; collateral review of Fourth Amendment claims, Stone v. Powell, 428 U.S. 465; live-witness testimony, United States v. Ceccolini, 435 U.S. 268; and, evidence seized in violation of a third party's rights, United States v. Payner,

447 U.S. 727; Rakas v. Illinois, 439 U.S. 128. The constant in each of these examples is that application of the exclusionary rule has been denied because, based upon a balancing of the public and individual interests involved, the rule's remedial objectives would not be efficaciously served.

Application of the foregoing principles to this case demonstrates that, when the conflicting interests are balanced, the Colorado Supreme Court mistakenly applied the exclusionary rule. The public interest here is strong. A neighbor's concerned watchfulness resulted in the burglar being apprehended by police before he could leave the neighborhood with the property that he had just stolen. This Court has declared that it is no part of the policy of the Fourth and Fourteenth Amendments to discourage citizens from

aiding to their utmost ability in the apprehension of criminals. Coolidge v. New Hampshire, 403 U.S. 443, 488. A result of the state court opinion in this case is citizens' frustration of efforts to prevent crime. Terry v. Ohio, 392 U.S. 1, 15.

Moreover, the police reasonably believed in good faith, as the record reflects (J.A. 16, 17), that they had made a lawful stop and a lawful arrest. Although the Colorado Supreme Court later ruled that the officers had made "a mistaken judgment of law", society is ill-served by imposing upon police officers the duty to make correct legal judgments eo instante when apprehending criminals, or the criminal will go free. Cf. Michigan v. DeFillippo, 443 U.S. 31, 38. The rationale for the exclusionary rule loses its force when officers act both reasonably and with

good faith that their conduct is lawful -- although a court may long after rule otherwise.

The defendant's interest here is that his arrest was deemed by the state appellate court to have been made without probable cause, and hence the seizure of the property that he had indisputably stolen should not be admitted into evidence against him. The record, however, discloses no oppressive interrogation, no coercion, no brutality, and no other quality of purposeful illegality on the part of the police.

Upon balance, therefore, application of the exclusionary rule here has exacted a substantial social cost for vindication of, at most, a minimal intrusion on defendant's Fourth Amendment rights. Rakas v. Illinois, 439 U.S. 128. The remedial objective of

the exclusionary rule has not been efficaciously served: the officers reasonably believed that they had acted lawfully; the imperative of judicial integrity would not have been offended because the police officers reasonably believed in good faith that their conduct was in accordance with law. United States v. Peltier, 422 U.S. 531, 538.

In sum, the Colorado Supreme Court has misinterpreted the Fourth Amendment and has mistakenly applied the exclusionary rule to this case. Petitioner is aware of the mass of reported federal and state decisions, as well as the mass, if not morass of scholarly treatises, concerning the exclusionary rule. But no talismanic formula is practicable or needed. When the exclusionary rule is viewed stripped to its reason for existence, petitioner

avers that the precedents of this Court refute that the exclusionary rule was ever contemplated to be applicable to the kind of circumstances presented by the case at bar.

The position of petitioner, the People of the State of Colorado, is this: where, as here, police officers acted reasonably and in good faith when they arrested respondent Quintero, the exclusionary rule serves no efficacious purpose. Petitioner submits that this position is fair and feasible. The "reasonable person" is a long accepted and pervasive legal concept, with well-settled modes of evidentiary proof. "Good faith" is also no legal innovation and is provable, as is any other state of mind, including the mens rea of criminal law. In asking for reversal of People v. Quintero, supra, petitioner seeks no new rule of law, but instead

urges the Court to declare that application of the exclusionary rule here conflicts with the Court's decisions.

Many years ago in 1925, a distinguished member of the Supreme Court of Colorado, the Honorable Hazlett P. Burke, who served for thirty years on that court, authored an opinion rejecting the broad concepts now embodied in the exclusionary rule. Massantonio v. People, 77 Colo. 392, 236 P. 1019. In that opinion he "endeavored to follow that rule which, in our judgment, leaves the law a sword to the state and a shield to the citizen without converting it into a bomb proof dugout for their enemies." Reporter at 1020.

To apply the exclusionary rule to the facts of this case would indeed deprive the state of the use of a

"sword", and remove the "shield" as a protection to the citizen, and would convert the exclusionary rule into a "bomb proof dugout" for the enemies of the state and the citizen.

Reversal of the cause before this court will restore "a sword to the state and a shield to the citizen," and it will help to eliminate the "bomb proof dugout" for their enemies.

CONCLUSION

The petitioner concludes, for the reasons stated in this brief and supported by the record, that the Colorado Supreme Court erroneously applied the exclusionary rule to a factual situation which does not lie within the area intended to be covered by that rule.

No purpose which this Court has stated justifies that the existence of

the rule is "efficaciously served" by application of the rule to the facts of this case. Such application will not deter willful and abusive police misconduct. The "imperative of judicial integrity" is not served. To the contrary, application of the rule to this case tends to destroy any public confidence in the integrity of the criminal justice system.

We aver that the opinion of the Colorado Supreme Court failed to recognize at least three constant principles which are found in the decisions of this Court, namely:

(1) Only "unreasonable" seizures are prohibited by the Fourth Amendment. The seizure in this case was not unreasonable.

(2) The purposes for which the exclusionary rule was adopted are not served by application of that rule to

the facts of this case.

(3) Application of the rule of exclusion to the facts of this case amounts to an indiscriminate use thereof, and fails to take into account a balancing of the public and private interests involved.

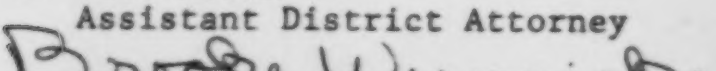
WHEREFORE, the petitioner prays that the decision of the Supreme Court of Colorado be reversed, with directions to order trial of the issues permitting the admission of the evidence suppressed by the Colorado court.

Respectfully submitted,

THE STATE OF COLORADO,
Petitioner

BY: NORMAN S. EARLY, JR.
District Attorney
City and County of Denver

O. OTTO MOORE
Assistant District Attorney



BROOKE WUNNICKE
Chief Appellate Deputy
District Attorney

SEPTEMBER 9, 1983.

CERTIFICATE OF SERVICE

Pursuant to Sup. Ct. R. 28.5(b), I hereby certify that 3 copies of the foregoing petitioner's opening brief on the merits have been served upon counsel for respondent, Thomas M. Van Cleave III., Deputy State Public Defender, Appellate Division, by personal delivery on Friday, September 9, 1983, to an employee in his office at 1575 Sherman Street, Denver, Colorado 80203.

Brooke Wunnicke

BROOKE WUNNICKE
Counsel of record for Petitioner

No. 82-1711

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THE STATE OF COLORADO,

PETITIONER,

v.

FIDEL QUINTERO,

RESPONDENT.

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SUPREME COURT OF COLORADO

PETITIONER'S SUGGESTION OF RESPONDENT'S DEATH AND MOTION TO PROCEED WITH ORAL ARGUMENT AND DECISION

I. Suggestion of Death

Pursuant to SUP.CT.R. 40, petitioner suggests the death on the record of respondent, Fidel Quintero. In support of this suggestion, petitioner states that the respondent's death was reported in a news story in The Denver Post on November 29, 1983. A copy of that news story is attached hereto as Exhibit A and incorporated here by this reference.

II. Motion to Proceed with Oral Argument and Decision

Petitioner respectfully moves the Court to proceed with the oral argument in the captioned case, now scheduled for January 17, 1984, and with its decision on the merits. As grounds for this motion, petitioner states:

1. This case is not subject to automatic abatement ab initio by reason of the death of the defendant in this criminal proceeding for the following reasons.

a. The decedent, Fidel Quintero, is not the petitioner but the respondent; and, there is no conviction to be abated because People v. Quintero, 657 Colo. 948 (Colo. 1983), upon

which the instant certiorari proceeding is predicated, was an interlocutory appeal from a pre-trial suppression of physical evidence.

b. Unless the Court resolves the instant matter on the merits, petitioner will continue to be subject to the precedent of People v. Quintero, supra; and, petitioner avers that this precedent is contrary to U.S. CONST., amend. IV. and the Court's construction thereof, because the Colorado Supreme Court has mistakenly applied the exclusionary rule to the warrantless seizure of stolen property made incident to an arrest that the police reasonably and in good faith believed to be supported by probable cause.

2. The instant case presents a persistent and recurring question of serious public import to petitioner, the State of Colorado, and is, therefore, a controversy within the ambit of U.S. CONST. ART. III., §2, cl. 1.

The question raised in the instant case is not subject to resolution in either of the two cases pending on certiorari that involve the appropriate application of the exclusionary rule and which are also scheduled for oral argument on January 17, 1984, because: United States v. Leon, Sup.Ct. No. 82-1771, involves the legal sufficiency of the affidavit to support the search warrant, pursuant to which seizure made; and, Commonwealth of Massachusetts v. Sheppard, Sup.Ct. No. 82-963, involves the legal sufficiency of the search warrant form pursuant to which the seizure was made. State of Colorado v. Nunez, Sup.Ct. No. 82-1845, the only other Colorado criminal case pending on certiorari, also involves the legal sufficiency of the affidavit for search warrant.

The instant case differs significantly from Leon, Sheppard, and Nunez, because it involves a warrantless seizure made incident to a warrantless "street" arrest. The arresting officers responded to a telephone call from a citizen who was

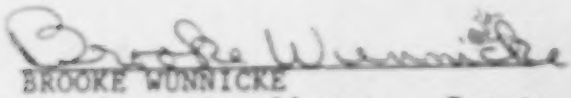
concerned that a possible burglar was in the neighborhood. Based upon the neighbor's information and the suspect's conduct, the officers reasonably and in good faith arrested the man. Incident to that arrest, the officers seized the just stolen portable television set that the man had with him. Were the Quintero opinion to remain precedent unabated by decision of this Court, petitioner would continue to be confronted with the recurring question: does the Fourth Amendment mandate application of the exclusionary rule to the common "street" situation typified by this case?

Respectfully submitted November 30, 1983.

THE STATE OF COLORADO,
Petitioner

BY: NORMAN S. EARLY, JR.
District Attorney
City and County of Denver

O. OTTO MOORE
Assistant District Attorney



BROOKE WUNNICKE
Chief Appellate Deputy District Attorney, counsel of record in this cause and a member of the Bar of the Supreme Court of the United States

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METRO

DENVER BRIEFS

Man Dies From Wounds

Denver police are investigating the death of Fidel Quintero, 34, of 1410 Navajo St., who died Sunday at Denver General Hospital — 50 days after he was shot in an altercation among several men in a West Denver park.

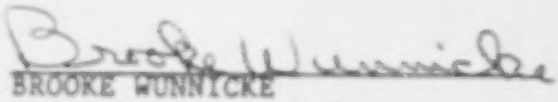
Detective James Rock said Monday that no arrests have been made in the case.

According to a police report made at the time of the shooting, an argument between Quintero, two of his friends and three other men erupted in gunfire at about 2:15 a.m. Oct. 8. Quintero suffered three gunshot wounds to his abdomen and one to his left arm.

Police questioned the participants but couldn't determine at the time which individuals did the shooting. No guns were recovered. Two other men were injured in the altercation.

CERTIFICATE OF SERVICE

Pursuant to Sup.Ct.R. 28.5(b), I hereby certify that a copy of the foregoing Petitioner's Suggestion of Respondent's Death and Motion to Proceed with Oral Argument and Decision has been served upon counsel for respondent, Thomas M. Van Cleave III., Deputy State Public Defender, Appellate Division, by personal delivery on Wednesday, November 30, 1983, to an employee in his office at 1575 Sherman Street, Denver, Colorado 80203.



BROOKE WUNNICKE
Counsel of record for
Petitioner

MOTION FILED

SEP -7 1983

No. 82-1711

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1982

THE STATE OF COLORADO,

Petitioner,

v.

FIDEL QUINTERO,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Colorado

MOTION FOR LEAVE OF COURT TO FILE BRIEF AS AMICUS CURIAE ON BEHALF OF PETITIONER
and
BRIEF OF AMICUS CURIAE ON BEHALF OF THE PETITIONER

Appellate Committee of the
California District
Attorneys Association

ROBERT H. PHILIBOSIAN
District Attorney of
Los Angeles County

HARRY B. SONDHEIM, Head Deputy
Appellate Division

RODERICK W. LEONARD
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Attorney for Amicus Curiae

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No. 82-1711

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1982

THE STATE OF COLORADO,

Petitioner,

v.

FIDEL QUINTERO,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Colorado

MOTION FOR LEAVE OF COURT TO FILE
BRIEF AS AMICUS CURIAE ON
BEHALF OF PETITIONER

Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, the Appellate Committee of the California District Attorneys Association and Robert H. Philibosian the District Attorney of Los Angeles County, a political subdivision of the State of

California within the meaning of Rule 36(4) respectfully move for leave of this Court to file the attached Amicus Curiae brief in support of Petitioner. Three copies of the brief, together with this request, have been served upon each counsel in the instant case as well as the Denver District Court and the Supreme Court of Colorado. Again, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, the Amicus Curiae brief attached hereto is being conditionally filed with this motion for leave to file this brief.[1]

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[1] Amicus is also seeking leave to file an amicus brief on behalf of the Petitioner in the case of Commonwealth of Massachusetts v. Sheppard, No. 82-963, which addresses the good faith exception to the exclusionary rule under circumstances of issuance and execution of a search warrant. Although this Court has

INTEREST OF AMICUS CURIAE

The Appellate Committee of the California District Attorneys Association is a committee created by the District Attorneys of California to utilize and coordinate the resources of District Attorneys' offices throughout the state, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major statewide impact on the prosecution of criminal offenses. Upon review of the instant matter, the Committee has concluded that the

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accepted for hearing a third case, United States v. Leon, 82-1771, Amicus has not filed a motion for leave to file an Amicus brief nor amicus brief therein since the Amicus believes that the search and seizure made incident to the execution of a search warrant in United States v. Leon, supra, is independently lawful under authority of Illinois v. Gates (1983) ___ U.S. ___, 103 S.Ct. 2317.

outcome of this case will have substantial impact upon the administration of criminal justice throughout California. Accordingly, the Committee has decided to move for leave of this court to file an Amicus Curiae brief herein. The Office of the District Attorney of the County of Los Angeles has been requested to prepare and submit this brief. The District Attorney of the County of Los Angeles is an authorized law officer of the County, which is a political subdivision of the State of California (see Supreme Court Rule 36(4)).

The central day-to-day function of the offices whose members constitute the California District Attorneys Association is to aid in the successful discovery,

apprehension, and prosecution of those who commit crimes. Therefore the Association and its membership have a vital interest in urging this Court to adopt the good faith exception to the exclusionary rule as set forth herein. It is felt by Amicus that such a rule is a reasonable modification of the present rule excluding previously seized relevant evidence.

Amicus curiae has researched and analyzed the development of the exclusionary rule. Amicus has studied the opinion of the Colorado Supreme Court. Amicus is intimately familiar with the impact of the exclusionary rule on prosecution of crime in California. It is felt that Amicus' analysis of the issues, with specific reference

to the experience in California, will be of assistance to this Court in its resolution of the issues of law presented by this case. A brief summary of argument in support of the adoption of the good faith exception to the exclusionary rule follows this Motion for Leave and, insofar as it further elucidates why the brief of amicus is desirable, is incorporated herein.

For all of the above stated reasons, it is urged that this Court

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grant this motion for leave to file the Amicus Curiae brief which is attached hereto.

Respectfully submitted on behalf of the Appellate Committee of the California District Attorneys Association

ROBERT H. PHILIBOSIAN
District Attorney of
Los Angeles County

By

HARRY B. SONDHEIM
Head, Appellate Division

RODERICK W. LEONARD
Deputy District Attorney

Attorney for Amicus Curiae

SUMMARY OF ARGUMENT

This brief urges that a good faith exception to the exclusionary rule be adopted. Specifically, it is submitted that when a police officer acts without warrant or other judicial mandate and seizes evidence, that evidence should not be suppressed where the police officer's conduct is both subjectively reasonable (that police officer in fact believed he/she acted lawfully) and objectively reasonable (a police officer would reasonably believe that he/she acted lawfully).

Unfettered application of the exclusionary rule, which suppresses admittedly relevant evidence, has a deleterious effect upon successful prosecution of crime. A California study of cases rejected

for search and seizure consideration reflects that almost half of those individuals whose cases were rejected were rearrested within two years. That same California experience disclosed that almost one third of all felony drug arrests sampled were rejected at the time these cases were presented for filing to the prosecutor due to problems with search and seizure.

California voters have recognized the adverse impact upon public safety of excluding relevant and truthful evidence. The voters of this State have adopted an amendment to their constitution which limits exclusion of relevant evidence to the requirements of the federal constitution.

The objectives of the

exclusionary rule, deterrence of future police conduct and assurance of "judicial integrity", are not furthered in instances when police conduct is both subjectively and objectively reasonable. It is urged that this Court adopt the good faith exception to the exclusionary rule.

ARGUMENT

A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE SHOULD BE ADOPTED

The evolution of the exclusionary rule reflects the development of a concept which is by no means monolithic or without controversy (see generally Kaplan, The Limits of the Exclusionary Rule, 26 Stan.L.Rev. 1027) (1974); Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 J. Crim. L. &

Criminology 635 (1978); Gifford, Constitutional Law: Search and Seizure - The Role of Police Officer Good Faith in Substantive Fourth Amendment Doctrine - Michigan v. DeFillippo (1979) 443 U.S. 31, 55 Wash. L. Rev. 849 (1980); Bringegar, Limiting the Application of the Exclusionary Rule - The Good Faith Exception, 34 Vand. L. Rev. 213 (1981); Leonard, The Good Faith Exception to the Exclusionary Rule: A Reasonable Approach for Criminal Justice, 4 Whittier L.R. 33 (1981)). Initially conceived as relating both to the Fourth and Fifth Amendment (Boyd v. United States (1886) 116 U.S. 616, 632, 634-635, 6 S.Ct. 524, 29 L.Ed. 746), the exclusionary rule had been applied to the states under precepts of due process in Rochin v.

California (1952) 342 U.S. 165, 186, 96 L.Ed. 183, 72 S.Ct. 205, until in Mapp v. Ohio (1961) 367 U.S. 643, 655, 6 L.Ed.2d 1081, 1090, 81 S.Ct. 1684 a plurality opinion of this Court stated "that all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court". However, only four justices subscribed to the view that the Fourth Amendment of the Constitution required the exclusion of unconstitutionally seized evidence in state criminal trials.[2] Moreover,

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2 Only four of the five Supreme Court Justices who comprised the majority in Mapp v. Ohio, supra, 367 U.S. 643, were of the opinion that the Fourth Amendment of the Constitution required the exclusion of unconstitutionally seized evidence in state criminal trials. The majority opinion was authored by Justice Clark (id. at 643). The concurring opinion was by Justice

subsequent to Mapp v. Ohio, supra, this Court has reiterated that the exclusionary rule is judicially created and is not constitutionally

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Douglas (id. at 666). Justice Black stated in a concurring opinion that the Fourth Amendment, standing alone, did not bar from evidence items seized in violation of its commands. Only when the Fourth Amendment's ban against unreasonable searches and seizures is considered in conjunction with the Fifth Amendment's ban against self-incrimination did a constitutional basis emerge which required the exclusionary rule (id. at 661-662; see Justice Harlan's dissenting opinion (id. at 672)). Justice Stewart expressed no view on the merits of the constitutional issue before the Court. He would have reversed on the ground that the Ohio statute under which the defendant was convicted violated constitutional guarantees of free thought and expression (id. at 682). Note that Justice Powell, writing for the six member majority in Stone v. Powell (1976) 428 U.S. 465, 49 L.Ed.2d 1046, 96 S.Ct. 3021), stated with respect to Mapp: "Only four Justices adopted the view that the Fourth Amendment itself requires the exclusion of unconstitutionally seized evidence in state criminal trials." (Id. 428 U.S. 465, 484 n. 21).

mandated (United States v. Calandra (1974) 414 U.S. 338, 348, 38 L.Ed.2d 561, 571, 94 S.Ct. 613; United States v. Peltier (1975) 422 U.S. 531, 538, 45 L.Ed.2d 374, 95 S.Ct. 2313; United States v. Janis (1976) 428 U.S. 433, 459-460, 49 L.Ed.2d 1046, 96 S.Ct. 3021; Stone v. Powell (1976) 428 U.S. 465, 482, 49 L.Ed.2d 1067, 96 S.Ct. 3037). The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim (United States v. Calandra, supra, 414 U.S. at 347). Rather the rule's prime purpose has been to deter future unlawful police conduct (United States v. Calandra, supra, 414 U.S. at 347; United States v. Peltier, supra, 422 U.S. at 536; United States v. Janis, supra, 428 U.S. 446), although empirical studies

have never confirmed that the rule is effective in this respect (United States v. Janis, supra, 428 U.S. at 458, note 35; Stone v. Powell, supra, 428 U.S. at 484-485; Illinois v. Gates, supra, ___ U.S. ___ 103 S.Ct. 2317, Justice White concurring).[3] A subordinate purpose of the exclusionary rule, assurance of "judicial integrity" by not admitting illegally seized evidence in certain

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3 The most comprehensive study on the effectiveness of the deterrence purpose of the exclusionary rule is Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi.L.Rev. 665 (1970), which is discussed together with other studies in footnote 22 of the opinion in United States v. Janis, supra. After discussing the various studies this Court in Janis states: "The final conclusion is clear. No empirical research, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect even in the situations in which it is now applied." (Id. at 452).

criminal proceedings (United States v. Janis, supra, 428 U.S. at 458, note 35; Stone v. Powell, supra, 428 U.S. at 484-485), "does not mean that the courts must never admit evidence obtained in violation of the Fourth Amendment" (United States v. Janis, supra, 428 U.S. at 458, note 35). There is the recognition that the suppression of probative but tainted evidence exacts a costly toll upon the search for the truth in criminal proceedings (United States v. Payner (1980) 447 U.S. 727, 734, 65 L.Ed.2d 468, 476, 100 S.Ct. 2439; Illinois v. Gates, supra, ___ U.S. ___ 103 S.Ct. 2317, Justice White concurring). Thus, the rule is not applied where the defendant is not the direct recipient of the unlawful search (Rakas v. Illinois (1978) 439 U.S.

128, 58 L.Ed.2d 387, 99 S.Ct. 421). The exclusionary rule has not been extended to grand jury proceedings (United States v. Calandra, supra, 414 U.S. 338). It has been rejected in civil proceedings respecting the return of unconstitutionally seized property (United States v. Janis, supra, 428 U.S. 433). The rule has been restricted in the area of relitigation of habeas corpus claims in federal courts (Stone v. Powell, supra, 428 U.S. 465). The application of the exclusionary rule is not required where law enforcement acts in good faith reliance upon a statute or ordinance which is subsequently held to be unconstitutional (United States v. Peltier (1975) 422 U.S. 531, 45 L.Ed.2d 374, 95 S.Ct. 2313; Michigan

v. DeFillippo (1979) 443 U.S. 31, 61 L.Ed.2d 343, 99 S.Ct. 2627).

It has been repeatedly recognized by this Court that unbending application of the exclusionary rule undermines the truth finding function of our criminal justice system (e.g. Rakas v. Illinois (1978) 439 U.S. at 137-138, 58 L.Ed.2d 387, 99 S.Ct. 421; United States v. Ceccolini (1978) 435 U.S. 268, 275-279, 55 L.Ed.2d 268, 92 S.Ct. 1054; Stone v. Powell (1976) 428 U.S. 465, 489-491, 49 L.Ed.2d 1067, 96 S.Ct. 3037; Michigan v. Tucker (1974) 417 U.S. 433, 450-451, 41 L.Ed.2d 182, 94 S.Ct. 2357); United States v. Calandra, supra, 414 U.S. at 348, 38 L.Ed.2d 561, 94 S.Ct. 613; United States v. Payner, supra, 447 U.S. at

734, 65 L.Ed.2d at 476, 100 S.Ct. 2439).

A report by the National Institute of Justice of the United States Department of Justice (Criminal Justice Research Report, The Effect of the Exclusionary Rule, Study in California, December, 1982) illustrates the extent to which the exclusionary rule exacts a severe price upon a society which seeks to protect itself from crime. That Criminal Justice Research report reveals that almost half the individuals in California whose cases were rejected for search and seizure problems were rearrested within two years. An analysis of the nature of the felony rearrests disclosed that although many rearrests were for drug crimes, the majority of the rearrests

were for personal property crimes or other felony arrests (id. at 18). The report reflects that in the area of felony drug arrests, 32.5% of all felony drug arrests referred for prosecution to the Pomona Branch Office of the Los Angeles County District Attorney's Office in 1981 were rejected at the time these cases were presented to the prosecutor for filing due to problems with search and seizure. A sample of drug cases submitted to the Central Office of the Los Angeles District Attorney disclosed a 29% rejection rate due to search and seizure problems (id. at pages 2, 13). Moreover, the report concluded that the data analyzed in the study tended to understate the net effect of the exclusionary rule (id. at page 9). In light of the

toll the rule exacts from society, it is unjustifiable to exclude evidence obtained in good faith when the police officer has acted in both a subjective and objective reasonable manner.

The exclusionary rule "has been restricted to those areas where its remedial objectives are thought most efficaciously served." (United States v. Calandra (1974) 414 U.S. 338, 348, 38 L.Ed.2d 561, 94 S.Ct. 613; United States v. Payner, supra, 447 U.S. at 734, 65 L.Ed.2d at 476, 100 S.Ct 2439). These objectives are not furthered in instances, such as the case at bar, where police conduct is subjectively and objectively reasonable.

Where an arrest, search, and/or seizure is made without

benefit of warrant it is urged that a police officer's conduct must not only be undertaken in good faith (i.e. subjectively reasonable) but must also be objectively reasonable. This standard has been explained by the Fifth Circuit in United States v. Williams (5th Circuit 1980) 622 F.2d 830, 841, note 4a: "We emphasize that the belief [of the police officer], in addition to being held in subjective good faith, must be grounded in an objective reasonableness. It must therefore be based upon articulate premises sufficient to cause a reasonable, and reasonably trained, officer to believe that he was acting lawfully". By requiring a subjective and objective reasonable good faith belief that the evidence may properly

be seized, restraint is placed upon unjustified police conduct. Meanwhile, the standard to be employed does not unreasonably punish society when the police officer does not act with the legal knowledge of a criminal law specialist of the bench or bar.

If a police officer engages in a search or seizure in the belief that his conduct is lawful and if, based upon the facts known to the officer and his expertise, if any, a reasonable person would conclude that the police officer acted lawfully, how can it be said that the officer's conduct violates the prohibition in the Fourth Amendment against unreasonable searches and seizures and, as a consequence thereof, how can the exclusion of evidence be

required? Certainly the purposes of the exclusionary rule would not be "efficaciously served" (United States v. Calandra, supra, 414 U.S. at 348) since there would appear to be no need to deter an officer from engaging in conduct which is both subjectively and objectively reasonable. Nor would "judicial integrity" (United States v. Janis, supra, 428 U.S. at 458) be compromised by such conduct.

CONCLUSION

In 1982 the voters of the State of California in a statewide primary election, adopted an initiative, Proposition 8, which modified the California Constitution so as to conform California rules respecting the admissibility of seized evidence to the federal

constitutional model (Proposition 8, California Constitution, Article I, Section 28, subdivision (d)).[4] The

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[4] California Constitution, Article I, Section 28, subdivision (d) states:

> "Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press."

It was recognized that "[t]he measure [California Constitution, Article I, Section 28, subdivision (d)] could not affect federal regulations on the use of evidence" (California Ballot Pamphlet, Primary Election June 8, 1982, emphasis in original, Analysis by the Legislative Analyst, p. 32.)

People of this State recognized, in enacting that initiative, that society must be more effectively protected from crime (Proposition 8, California Constitution, Article I, Section 28, subdivision (a)).[5]

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[5] California Constitution Article I, Section 28, subdivision (a) is a preamble to Proposition 8 which states:

> "The People of the State of California find and declare that the enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system to fully protect those rights, is a matter of grave statewide concern. The rights of victims pervade the criminal justice system, encompassing not only the right to restitution from the wrongdoers for financial losses suffered as a result of criminal acts, but also the more basic expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and sufficiently punished so that the public safety is protected and

Californians now look to this Court for the standard to be applied in respect to admission of previously

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encouraged as a goal of highest importance.

Such public safety extends to public primary, elementary, junior high, and senior high school campuses, where students and staff have the right to be safe and secure in their persons.

To accomplish these goals, broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons are necessary and proper as deterrents to criminal behavior and to serious disruption of people's lives."

seized evidence. This Court should adopt the good faith exception to the exclusionary rule.

Respectfully submitted on behalf of the Appellate Committee of the California District Attorney's Association

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By

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DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, the undersigned, hereby declare under penalty of perjury, that the following is true and correct:

I am a citizen of the United States, over eighteen years of age, not a party to the within cause and employed in the Office of the District Attorney of Los Angeles County, under the supervision of Roderick W. Leonard, Deputy District Attorney, a member of the bar of this court at whose direction the service was made, with principal offices located at 849 South Broadway, Los Angeles, California 9014-3296; that the District Attorney of Los Angeles County is the amicus curiae on behalf

of the Petitioner in the above-entitled matter. On September 6, 1983, I served three copies of the foregoing on the following persons and courts by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in the City of Los Angeles in compliance with Supreme Court Rule 28, paragraph three, addressed as follows:

NORMAN S. EARLY, JR.
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DENVER DISTRICT COURT
1437 BANNOCK
DENVER CO 80208

Executed on September 6, 1983 at Los Angeles, California.

_____

MARK NAGAI

DECLARATION OF SERVICE ON THE COURT

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

The undersigned, Roderick W. Leonard, Deputy District Attorney, is a member of the bar of this court. On September 6, 1983, under my supervision, Cecil Patterson, an employee of the office of the District Attorney of Los Angeles County, placed in the United States mail, with first class postage prepaid and via U. S. Postal Service Express mail, with postage prepaid, a box containing forty copies of the instant brief accompanied by an entry of appearance addressed as follows:

Office of the Clerk
United States Supreme Court
Washington DC 20543

Office-Supreme Court, U.S.
FILED
SEP 12 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1711

In the Supreme Court of the United States

October Term, 1983

STATE OF COLORADO,
Petitioner,

vs.

FIDEL QUINTERO,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

BRIEF OF AMICI CURIAE, THE STATE OF ARKANSAS, THE STATE OF KANSAS, THE STATE OF MISSOURI, THE STATE OF SOUTH DAKOTA, THE STATE OF WISCONSIN AND GULF & GREAT PLAINS LEGAL FOUNDATION, IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici the State of Kansas, the State of Missouri, the State of South Dakota, and the State of Wisconsin, as sovereign states, have a strong interest in the outcome of this case. In maintaining a rational and effective system of criminal justice, each state has a strong concern for protecting its citizens from criminal activity, as well as in seeing that the constitutional right of its citizens to be free of unreasonable searches and seizures is safeguarded.

Amicus Gulf & Great Plains Legal Foundation is a not-for-profit public interest legal foundation established in 1976. Its goals include the maintenance of a rational system of criminal justice, the preservation of the free enterprise system, and the protection of individual and constitutional rights. The Foundation has appeared as amicus curiae in a number of cases before this Court, including several cases relating to criminal and constitutional law.

No. 82-1771

In the Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA,
Petitioner,

vs.

ALBERTO ANTONIO LEON, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE, THE STATE OF KANSAS, THE STATE OF MISSOURI, THE STATE OF SOUTH DAKOTA, THE STATE OF WISCONSIN AND GULF & GREAT PLAINS LEGAL FOUNDATION, IN SUPPORT OF PETITIONER

SUMMARY OF ARGUMENT

The Court has granted certiorari in three cases—*Massachusetts v. Sheppard, Colorado v. Quintero,* and *U. S. v. Leon*—which all present the potential of creating a "good faith" exception to the exclusionary rule. Constitutional jurisprudence prior to *Mapp v. Ohio,* 367 U.S. 643 (1961), expressly negatived any assumption that the exclusionary rule was mandated by the Fourth Amendment as applied to the states by the Fourteenth Amendment. The holding in *Mapp* that the exclusionary rule was constitutionally required by the Fourth Amendment was

agreed to only by four justices, and subsequent decisions of this Court have undermined any basis for the position that the exclusionary remedy is constitutionally required. The Court has refused to apply it in situations where it would have been applied had it been of constitutional dimension, and has refused to apply it retroactively, both of which are inconsistent with the notion that it is constitutionally mandated. Several justices have expressly stated that the exclusionary remedy is not of constitutional dimension, and this view is concurred in by the current President and a number of members of Congress.

Empirical research regarding the deterrent effect on the police of the exclusionary rule is inconclusive at best. However, the serious costs imposed by the exclusionary rule are virtually indisputable. Most serious among these are the freeing of dangerous criminals, the lack of proportionality between the violation and the remedy, and the consequent disrespect for the administration of justice which is engendered by the exclusionary rule.

Given the extreme complexity of Fourth Amendment search and seizure law, it is unrealistic to expect police officers to be able to apply it flawlessly under the difficult conditions in which they must work. Furthermore, the deterrence rationale for the exclusionary rule loses much of its force when good faith on the part of police officers is present. An exception to allow illegally seized evidence to be admitted would significantly improve the truth-seeking function of criminal trials, and diminish the degree to which the guilty go free. A more flexible test, in which factors such as the seriousness of the Fourth Amendment violation, the seriousness of the crime, and the centrality of the evidence in question could be considered, would provide a much-needed balance between the enforcement of the Fourth Amendment and the protection of society.

ARGUMENT

I. THE EXCLUSIONARY RULE IS A JUDICIALLY CREATED REMEDY ONLY, AND IS NOT CONSTITUTIONALLY MANDATED TO PROTECT FOURTH AMENDMENT RIGHTS.

Each of the three cases in which the Court has granted certiorari—*Massachusetts v. Sheppard, Colorado v. Quintero, and U. S. v. Leon*—presents in different form a similar issue: must evidence obtained contrary to the Fourth Amendment's protections against unreasonable searches and seizures automatically be excluded, or might an exception be made where the police officer acted reasonably and in good faith? Critical to the resolution of this issue is an examination of the constitutional and theoretical underpinnings of *Mapp v. Ohio*, 367 U.S. 643 (1961), the case which first imposed the exclusionary rule on the several states. *Mapp* purported to find a constitutional basis for the application of the exclusionary rule to the states. If the exclusionary rule is rooted in the Constitution, a considerably different question is presented than if the rule is merely one of practical expediency, which may be changed according to the lessons of experience. This brief will demonstrate that, in the light of constitutional jurisprudence before and after the *Mapp* decision, the attempt in *Mapp* to ground the exclusionary rule in the Fourth Amendment stands out as an anomaly. Logic and this Court's other decisions show that the exclusionary rule is only one means which may be used to ensure that the Fourth Amendment's guarantees will be respected, and is not itself constitutionally mandated. As such, it may be modified by the Court to bring it in harmony with the dictates of experience and the ends of justice.

Before analyzing *Mapp* and subsequent decisions, a brief review of the prior history of the exclusionary rule may be helpful.

For the first century of our nation's existence, neither this Court nor the other federal courts held that the suppression of improperly obtained evidence in criminal trials was either necessary or proper to implement the Fourth Amendment protections against unreasonable searches and seizures. The first intimation that such evidence might be suppressed under the Fourth Amendment came in *Boyd v. United States,* 116 U.S. 616 (1886). *Boyd* held that, in a federal proceeding, certain individuals could not be compelled by order of the court to produce private papers which would be incriminating to them. Though the Court discussed the Fourth Amendment at some length, the case appeared to be decided principally upon Fifth Amendment grounds, since no actual search or seizure had taken place. Nevertheless the case is significant as providing the first suggestion, halfway through the history of this country, that pertinent evidence might be withheld on Fourth Amendment grounds in a proceeding related to enforcement of criminal statutes.

It is significant that, eighteen years later, the Supreme Court in reviewing a criminal prosecution expressly reaffirmed the existing common law rule that a trial court has no justification under the Fourth Amendment for inquiring into the means by which evidence was obtained. *Adams v. New York,* 192 U.S. 585 (1904). *Adams* expressly distinguished *Boyd* as a Fifth Amendment case, and the authorities cited in *Adams* show that this refusal to suppress valid evidence was the uniform and prevailing rule.

Weeks v. United States, 232 U.S. 383 (1914), is widely regarded as the case which first applied the exclusionary

rule to federal agencies. In that case, the defendant's personal effects and papers had been seized by government agents without a warrant, and not pursuant to an arrest. The defendant filed a petition to have such property returned to him prior to the trial. The Supreme Court held that the refusal by the trial court to return all of such effects and papers violated the Fourth Amendment. The Supreme Court recognized the rule in *Adams* that the trial court should not inquire into the origin of evidence at trial, but held that the defendant had the right prior to trial to have his property returned to him. The practical effect, therefore, was to prevent the use of such evidence at trial.

The Fourth Amendment's guarantee against unreasonable searches and seizures was extended to the states through the Fourteenth Amendment only as recently as 1949. In the case which created that extension, *Wolf v. Colorado,* 338 U.S. 25 (1949), the Court nevertheless expressly refused to impose a requirement on the states that the Fourth Amendment be implemented through the remedy of the exclusionary rule. The Court enumerated the common law and statutory protections then provided by the states to punish and deter Fourth Amendment violations, and to compensate victims of such violations, and concluded:

> Indeed, the exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found. We cannot, therefore, regard it as a departure from basic standards to remand such persons, together with those who emerge scatheless from a search, to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford. *Id.* at 31.

The Court held that the exclusionary remedy established in *Weeks* was a "matter of judicial implication" and was "not derived from the explicit requirements of the Fourth Amendment." *Id.* at 28. Noting that men "with a complete devotion to the right of privacy" might differ regarding the need for the exclusionary rule, and that most of the English-speaking world does not regard that remedy as vital to such protection, the Court decided that it must "hesitate to treat this remedy as an essential ingredient of the right." *Id.* at 28-29.

To the extent that *Wolf* refused to impose such a requirement on the states, it was overruled by *Mapp v. Ohio,* 367 U.S. 643 (1961). Though the effect of *Mapp* was clearly to impose a requirement on the states that they employ the exclusionary rule, it is noteworthy that in *Mapp* only four Justices found that the exclusionary remedy itself was compelled by the Fourth Amendment. Justice Stewart concurred in the result without reaching "the merits of the constitutional issue which the Court today decides." *Id.* at 672. Justices Harlan, Frankfurter and Whittaker filed a strong dissent. Justice Black, concurring in result, stated that he was:

> not persuaded that the Fourth Amendment standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands. For the Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures. *Id.* at 661-662.

Justice Black based his concurrence on a joint interpretation of the Fourth and Fifth Amendments. *Id.* at 662. It is

significant that Justice Black had concurred in the *Wolf* decision, that his unique interpretation in *Mapp* failed to garner support in later decisions of the Court, and that in later decisions he made it clear that his concurrence in *Mapp* was based upon the Fifth Amendment, not the Fourth. As he stated in dissent in *Coolidge v. New Hampshire*, 403 U.S. 443, 496-97:

> The Fourth Amendment prohibits unreasonable searches and seizures. The Amendment says nothing about consequences. It certainly nowhere provides for the exclusion of evidence as the remedy for violation. * * * The truth is that the source of the exclusionary rule simply cannot be found in the Fourth Amendment. That Amendment did not when adopted, and does not now, contain any constitutional rule barring the admission of illegally seized evidence.

See also, e.g., Kaufman v. United States, 394 U.S. 217, 237 (1969) (Black, J., dissenting); *Bumper v. North Carolina*, 391 U.S. 543, 560 (1968) (Black, J., dissenting); *Simmons v. United States*, 390 U.S. 377, 397 (1968) (Black, J., concurring and dissenting).

On several occasions since *Mapp*, the Court has drawn a distinction between the finding of a Fourth Amendment violation, and the appropriate remedy for that violation. Speaking for the Court, Justice Rehnquist recognized a distinction urged by the Government between "[w]hat is necessary to establish a . . . constitutional violation and what is necessary to support a suppression remedy once a violation has been established." *Scott v. United States*, 435 U.S. 128, 135 (1978). The Court has indicated that the exclusionary rule is only a "judicially created remedy" rather than a "personal constitutional right." *Stone v. Powell*, 428 U.S. 465, 482 (1976); *United States v. Calandra*, 414 U.S. 338, 348 (1974). If the exclusionary rule were

part and parcel of the Fourth Amendment, and created a personal constitutional right in every person who was the victim of an illegal search or seizure, then the fruits of the search or seizure should not be able to be used against him in any type of proceeding. But the Court has almost uniformly refused to extend the exclusionary rule to situations other than criminal trials. *See, e.g., Stone v. Powell,* 428 U.S. 465, 482 (1976) (habeas corpus proceedings); *United States v. Janis,* 428 U.S. 433, 454 (1976) (civil suit by government); *United States v. Calandra,* 414 U.S. 338, 348 (1974) (grand jury proceedings).

Even in a criminal trial, the remedy of exclusion is not absolute. *United States v. Havens,* 446 U.S. 620 (1980) (impeachment of statements made by defendant on cross-examination); *United States v. Ceccolini,* 435 U.S. 268 (1978) (voluntary testimony by live witnesses). In several major cases, the Court has also declined to give retroactive effect to the exclusionary rule when decisions of the Court have extended the reach of Fourth Amendment protections. *Williams v. United States,* 401 U.S. 646 (1971); *Desist v. United States,* 394 U.S. 244 (1969); *Linkletter v. Walker,* 381 U.S. 618 (1965). None of the holdings of these cases is consistent with the theory that the exclusionary rule is of constitutional dimension.

If the exclusionary rule were of constitutional dimension, it would certainly be beyond the power of Congress to change it. However, as long ago as 1971, the Chief Justice called upon Congress to pass a statute providing, *inter alia,* "that no evidence, otherwise admissible, shall be excluded from any criminal proceeding because of violation of the Fourth Amendment." *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 423 (1971) (Burger, C.J., dissenting). In *Wolf,* 338 U.S. at 33, Mr. Justice Frankfurter expressly

recognized that a "different question" would be presented if Congress were to pass a statute purporting to negate the *Weeks* doctrine as it respects federal agencies, or if Congress attempted to make the exclusionary rule binding upon the states by statute. In the same case, Mr. Justice Black, concurring, stated that he felt it to be the "plain implication" of the Court's opinion that the exclusionary rule is "not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate." *Id.* at 39-40.

The President and at least certain members of Congress are of the same view. On March 18, 1982, Senators Thurmond and DeConcini introduced on behalf of the Administration a bill to provide a good faith exception to the exclusionary rule. 128 Cong. Rec. S2417 (daily ed. March 18, 1982). On September 13, 1982, the Criminal Justice Reform Act of 1982 was introduced in the Senate on behalf of the Administration. Among other things, it also contained a statutory good faith exception. 128 Cong. Rec. S11338 (daily ed. Sept. 13, 1982). The message by President Reagan accompanying that bill noted that although "the argument for retaining the exclusionary rule in any form is, at best, tenuous" the bill would at least eliminate application of the rule "in those cases in which it most clearly has no deterrent effect." *Id.* Though this Court is, of course, the final arbiter of whether the exclusionary rule is constitutionally based, the rule announced in *Mapp* that it is constitutionally required appears to have received as little credence in the executive and legislative branches as it has implicitly received in the later decisions of the Court.

In summary, the exclusionary rule is a rather late development in Fourth Amendment jurisprudence, and the leading case, *Mapp v. Ohio,* contained no clear or persuasive

constitutional mandate for the remedy of exclusion. Subsequent court opinions have emphasized that the exclusionary rule does not create a personal constitutional right, but is instead merely a judicially created remedy. The Court has, for the most part, declined to extend that remedy into areas other than the direct admission of evidence in criminal prosecutions. The reasonable inference is that the exclusionary rule, having been created by the Court as a prudential remedy, can also be changed by this Court if the remedy is seen not to have achieved its main purpose, or is seen to have created other undesirable effects. We therefore turn to a discussion of the purposes underlying the rule, and the severe, negative consequences which it has created.

II. THE EXCLUSIONARY RULE DOES NOT ACCOMPLISH THE MAIN PURPOSES FOR WHICH IT WAS IMPLEMENTED, BUT INSTEAD LEADS TO MAJOR DYSFUNCTIONS IN THE CRIMINAL JUSTICE SYSTEM.

It is now well recognized that the overriding purpose of the exclusionary rule, if not its sole purpose, is the deterrence of illegal searches and seizures by police. In *Mapp v. Ohio,* 367 U.S. 643 (1961), Justice Clark stated that the purpose of the exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Id.* at 656 (quoting *Elkins v. United States,* 364 U.S. 206, 217 (1960)). References have also been made to a supposed purpose of preserving "judicial integrity"—that is, preventing the judicial process from becoming sullied by the use of unconstitutionally obtained evidence. *See discussion in United States v. Peltier,* 422 U.S. 531, 536-39 (1975). However, most decisions have made it clear that the practical rationale for the exclusionary rule is

deterrence, and that the rule must survive or fall on that basis. *See, e.g., United States v. Janis*, 428 U.S. 433, 446-54 (1976).

Though a number of empirical studies have been performed to determine whether the exclusionary rule does in fact deter illegal conduct, the results have been inconclusive. One of the more comprehensive empirical studies examined statistics and other facts relating to Motions to Suppress in the city of Chicago over a twenty-year period. J. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. Legal Stud. 243 (1973). The study covered the years 1950-1970, a period almost evenly divided between the pre-*Mapp* and post-*Mapp* years. The author questioned whether the exclusionary rule in fact had any deterrent effect on police officers, noting that "[t]he individual police officer who is involved in a Motion to Suppress often leaves the courtroom confused rather than clarified as to what his proper conduct should be." *Id.* at 276. Perhaps the most thoroughgoing of such studies is D. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970). This study reviewed most of the empirical data which had previously been published on this subject, together with certain new data. The author concluded that the data provided "little support for the proposition that the exclusionary rule discourages illegal searches and seizures . . . ." *Id.* at 667. The article closes with a call for the abolition of the exclusionary rule. *Id.* at 754.

In this respect, little has changed in the thirty-five years since *Wolf* was decided. In 1954, Mr. Justice Jackson stated: "What actual experience teaches we really do not know." *Irvine v. California*, 347 U.S. 128, 135 (1954). One year prior to the *Mapp* decision, Mr. Justice Stewart ad-

mitted that "empirical statistics are not available" to show that the exclusionary rule deters unlawful searches and seizures. *Elkins v. United States,* 364 U.S. 206, 218 (1960). After reviewing the literature, Mr. Justice Blackmun, writing for the Court, more recently expressed serious doubts about the empirical underpinnings of the rule. *United States v. Janis,* 428 U.S. 433, 446-54 (1976).

On the other hand, it has become increasingly clear that the exclusionary rule has a number of severe adverse consequences. One leading commentator on the exclusionary rule, Judge Malcolm R. Wilkey of the Court of Appeals for the District of Columbia, has identified no fewer than twelve separate costs of the exclusionary rule. Judge Wilkey's list is as follows:

1. "The criminal is to go free because the constable has blundered."

2. Only the undeniably guilty benefit from the exclusionary rule, while innocent victims of illegal searches have neither protection nor remedy.

3. The exclusionary rule in any form vitiates all internal disciplinary efforts by law enforcement agencies.

4. The disposition of exclusionary rule issues constitutes an unnecessary and intolerable burden on the court system.

5. The exclusionary rule forces the Judiciary to perform the Executive's job of disciplining its employees.

6. The misplaced burden on the Judiciary deprives innocent defendants of due process.

7. The exclusionary rule encourages perjury by the police.

8. The exclusionary remedy makes hypocrites out of judges.

9. The high cost of applying the exclusionary rule causes the courts to expand the scope of search and seizure for all citizens.

10. The exclusionary rule is applied with no sense of proportion to the crime of the accused.

11. The exclusionary remedy is applied with no sense of proportion to the misconduct of the officer.

12. All of the above costs result inevitably in greatly diminished respect for the judicial process, lawyers and laymen alike.

See M. Wilkey, *Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule* (National Legal Center for the Public Interest, 1982) [*reprinted* at 95 F.R.D. 211 (1982)]; M. Wilkey, *Constitutional Alternatives to the Exclusionary Rule,* 23 S. Tex. L. J. 531 (1982).

The Court itself has identified five major costs of the exclusionary rule in *Stone v. Powell,* 428 U.S. 465, 489-91 (1976). The Court considered the following five costs to be "well known":

1. "[T]he focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding."

2. "[T]he physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant."

3. Application of the rule "deflects the truth finding process and often frees the guilty."

4. "The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is

contrary to the idea of proportionality that is essential to the concept of justice."

5. Because of these costs, the rule may have the "effect of generating disrespect for the law and administration of justice."

All of these costs identified by the Court and Judge Wilkey are significant. However, perhaps three costs are the most significant:

1. By suppressing reliable and oftentimes essential evidence, the rule allows guilty and dangerous criminals to go free;

2. By suppressing evidence regardless of the seriousness of the violation of Fourth Amendment rights, or the seriousness of the crime, the rule is contrary to the idea of proportionality that is essential to the concept of justice; and

3. By freeing dangerous criminals without regard to guilt, and diverting the inquiry at trial to technicalities, the rule generates disrespect for the law and the administration of justice.

The effect of a good faith exception or similar exception upon these costs will be discussed in Part III.

III. A GOOD FAITH EXCEPTION, OR BROADER EXCEPTION TAILORED TO PRACTICAL NEEDS AND THE NEED FOR A FAIR TRIAL, WOULD SUBSTANTIALLY REDUCE SOME OF THE MOST IMPORTANT COSTS OF THE EXCLUSIONARY RULE.

Of all of the many costs of the exclusionary rule, perhaps the single most serious is the societal cost of permitting unquestionably guilty criminals to go free on the

basis of abstruse technicalities. The literal impossibility of expecting police officers to interpret perfectly the arcane rules of search and seizure was vividly described in the message from the Assistant Attorney General which accompanied S. 2231, the bill to establish a good faith exception. That message mentioned the decision in *Robbins v. California*, 453 U.S. 420 (1981), and went on to state:

> In *Robbins*, the Court excluded evidence of a substantial quantity of marihuana found in a car trunk in a decision based largely on two previous cases, *United States v. Chadwick*, 433 U.S. 1 (1977), and *Arkansas v. Sanders*, 442 U.S. 753 (1979), neither of which had been decided at the time of the search in *Robbins* in 1975. The *Robbins* decision overruled previous decisions of the trial and appellate courts in California that the search was valid. When finally decided, 14 judges had reviewed the search; seven found it valid; seven invalid. To add to the confusion, less than three months after it decided *Robbins*, the Supreme Court granted certiorari in *United States v. Ross*, 102 S. Ct. 386 (1981) and asked both sides to address the question of whether *Robbins* should be reconsidered. It is unrealistic to think that the exclusionary rule can motivate even the most conscientious law enforcement officer to apply flawlessly the teaching of a body of law that the courts are still developing and debating, especially when the examination to test his knowledge is suddenly presented in a potential life or death situation. 128 Cong. Rec. S2417 (daily ed. March 18, 1982).

Given the inevitable complexity of Fourth Amendment search and seizure law, police officers must be given some degree of latitude in applying it. Justice White has forcefully argued for a "good faith" exception in his dissent in *Stone v. Powell*, 428 U.S. 465, 536 (1976). The Court

has also recognized that deterrence fails as a rationale when good faith is present:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. *Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force. Michigan v. Tucker,* 417 U.S. 433, 447 (1974). [emphasis added]

An exception to the exclusionary rule which would allow evidence obtained in violation of the Fourth Amendment to be used at trial, when the officer's actions were performed reasonably and in good faith, would significantly improve the truth-seeking process in those areas where the law is unclear, or is subsequently changed. By doing so, it would substantially mitigate the serious cost of allowing criminals to go free, and thereby minimize the disrespect for the criminal process which this tangle of technicalities has produced.

The societal costs of the exclusionary rule are not of course limited to the actual victimization and increased crime caused by the freeing of criminals. Disrespect for the courts results when the public perceives that there is only an attenuated relationship between guilt and conviction. Survey data bear this out. In April of 1965, when the effects of the Supreme Court's constitutional reforms of criminal procedure were just beginning to be felt, only 48% of the American public believed that the courts did not deal harshly enough with criminals. Gallup Opinion

Index Rep., No. 33 (1968). By February of 1968 that figure had risen to 63%, and by March of 1969 had increased to 75%. Gallup Opinion Index Rep., No. 33 (1968); Gallup Opinion Index Rep., No. 45 (1969). According to figures cited by Attorney General William French Smith, the percentage of the public which felt that the courts do not deal harshly enough with criminals had reached 90% by 1981. Comment, 23 S. Tex. L. Rev. 693, 700, n. 57 (1982). Though the exclusionary rule is certainly not entirely responsible for this perception of undue judicial leniency, it cannot have failed to have contributed to it.

At present, the determination of a Fourth Amendment violation on a Motion to Suppress is automatically tied to the exclusionary remedy. If a violation is found, the evidence is suppressed. Creating a good faith exception would divorce the issues of (1) finding a violation, and (2) deciding whether the evidence should be admitted. Since a two-step process will therefore be necessary, amici would suggest that any exception created by this Court might well address more than the reasonableness and good faith of the officer's conduct. Specifically, a more flexible exception would allow the trial court to consider other factors which will bring some proportionality to decision-making in this area. For example, assuming a Fourth Amendment violation has been found, the trial court should be able to consider factors such as the following in deciding whether the evidence should be suppressed:

1. Despite the existence of a Fourth Amendment violation, was the action of the officer nevertheless taken reasonably and in good faith?

2. How central is the evidence in question to determining guilt or innocence?

3. How serious was the invasion of the defendant's Fourth Amendment rights?

4. How serious was the crime, and, if the charge were to be proven, how dangerous is the alleged offender likely to be to society?

There are many types of evidentiary determinations in which the trial court must weigh the probativeness and value of the evidence against extrinsic policy concerns. Amici suggest that if the exclusionary rule is to be retained, it would be much more salutary to create a similar rule in cases of alleged Fourth Amendment violations, so that the critical interests of protecting society can be weighed against the deterrence which the exclusionary rule seeks to advance.

It is perhaps not necessary for this Court to determine the exact content of such a test which could be applied by state courts. If the exclusionary rule is not constitutionally mandated, this Court is certainly empowered to formulate a remedy for the federal courts under its general supervisory powers. But, if the rule is not of constitutional dimension, it is difficult to ascertain what would authorize this Court to develop a detailed rule for state courts. The Court is obviously empowered to ensure that the states enforce the strictures of the Fourth Amendment, as applied to the states through the Fourteenth. Nevertheless, there is certainly a great deal of room for experimentation and differences in judgment as to the contours of the remedy or remedies to be implemented. Thus, if the exclusionary rule is to be retained as applied to the states, amici would urge the Court to do no more than establish general guidelines for the states to observe in establishing a good faith exception, or in establishing a more flexible exception which would diminish the present costs of the exclusionary rule.

CONCLUSION

For the reasons stated above, the decision of the lower court should be reversed, and the case remanded for further proceedings.

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No. 82-1711

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

THE STATE OF COLORADO,
Petitioner,

vs.

FIDEL QUINTERO,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

BRIEF OF AMICUS CURIAE COLORADO DISTRICT ATTORNEYS COUNCIL

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QUESTION PRESENTED FOR REVIEW

Whether this Court should adopt an exception to the Fourth Amendment Exclusionary Rule to permit the admissibility of evidence which would otherwise be suppressed, in situations where law enforcement officers act with an objective, good faith belief that their conduct is proper.

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This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Counsel for the parties, and letters of consent of the parties have been filed with the Clerk of this Court.

INTEREST OF AMICUS

The Colorado District Attorneys Council is a separate legal entity comprised of members of the District Attorney's Offices in the twenty two Colorado Judicial Districts.

The Council provides programs of education, training, publications, and administrative assistance to the various District Attorney's Offices in the State of Colorado; these programs are intended to implement the Council's goal of promoting, fostering and encouraging an effective administration of justice in

Colorado and helping to ensure the safety of the public and the protection of the constitutional rights of accused persons.

Because it is an association of prosecuting attorneys, the Council is well aware of the problems faced by state and federal law enforcement officers in their daily efforts to deal with an increasing crime rate by using investigative procedures that comply with rapidly-changing judicial decisions interpreting the provisions of the Fourth Amendment. As prosecuting attorneys, the members of the Council must offer guidance to law enforcement officers as well as account to the public in situations where the courts have suppressed critical evidence which was seized in good faith by the police. It is the position of the Council that the Exclusionary Rule, enforced as an absolute, no longer serves the purpose for which it was originally adopted or the

needs of society.

STATEMENT

In the case of People v. Quintero, 657 P.2d 948 (Colo., 1983), the Colorado Supreme Court held that the police had no probable cause to arrest Quintero, despite the fact that he had been observed prowling around a house in a residential neighborhood and was later contacted at a nearby bus stop carrying a television set which he was trying to hide under his shirt. The Court refused to apply a Colorado Statute, Section 16-3-308, C.R.S. 1973, as amended, which codified much of the reasoning adopted by the members of this Court who have advocated the adoption of a good faith exception to the Exclusionary Rule. In its opinion, the Colorado Supreme Court noted that this Court had never adopted such a good faith exception, and that the Colorado Court was not inclined "to alter established Fourth

Amendment doctrine by approving such an exception," under either the Colorado statute or an interpretation of this Court's Fourth Amendment rulings. People v. Quintero, supra, at 950.

SUMMARY OF ARGUMENT

The issue of whether this Court should adopt a good faith exception to the Exclusionary Rule is ripe for determination under the facts of this case. Amicus respectfully urges this Court to adopt such an exception to the rule in all appropriate cases where the facts establish that the police acted with an objective, good faith belief that their conduct conformed to the requirements of the Fourth Amendment.

ARGUMENT

IF THIS COURT FINDS THAT THE EVIDENCE IN THIS CASE WAS OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT, IT SHOULD

ADOPT AND APPLY AN EXCEPTION TO THE FOURTH AMENDMENT EXCLUSIONARY RULE THAT WOULD PERMIT THE ADMISSION OF EVIDENCE SEIZED BY LAW ENFORCEMENT OFFICERS WHO HAVE ACTED WITH AN OBJECTIVE, GOOD FAITH BELIEF THAT THEIR CONDUCT WAS PROPER.

"The exclusionary rule was a judicially created means of effectuating the rights secured by the Fourth Amendment... the primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights." Stone v. Powell, 428 U.S. 465, 482, 486 (1976). The Exclusionary Rule, therefore, has as its primary goal the deterrence of police misconduct rather than the facilitation of the truth seeking process at trial.

"The costs of applying the

exclusionary rule even at trial and on direct review are well known: the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in the criminal proceeding. Moreover, the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the Defendant." Stone v. Powell, supra, at 489-490 (footnotes omitted). As this Court so aptly observed in Rakas v. Illinois, 439 U.S. 128 (1978), the Exclusionary Rule exacts a substantial social cost each time it is applied and relevant, reliable evidence is excluded.

The truth-seeking process is often hindered - if not defeated - by the suppression of probative, valuable evidence. "The disparity in particular

cases between the error committed by the police officer and the windfall afforded a guilty Defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice." Stone v. Powell, supra, at 490 (footnotes omitted).

The issue of proportionality also arises during consideration of the type of police conduct being regulated. Under the Exclusionary Rule as it currently exists, there is no differentiation between minor, unintentional Fourth Amendment violations and egregious misconduct on the part of the police. In either case, the police are faced with the same sanction: the suppression of any evidence obtained. The problem with such an approach is most apparent and least tolerable in situations where the evidence suppressed was initially seized by the officers in good faith.

In the cases of Michigan v. Tucker, 417 U.S. 433 (1974), and U.S. v. Peltier, 422 U.S. 531 (1975), this Court recognized that the deterrance rationale of the Exclusionary Rule was not met in situations where the officers had seized evidence in good faith:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." 417 U.S. at 447, 422 U.S. at 539.

The Court in Peltier continued, 422 U.S. at 542:

> "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it

> can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

If, at the very least, the Exclusionary Rule is designed to act as a guideline to which law enforcement officers can conform their conduct during investigations of crime, the rule loses much of its effectiveness in cases where the officers clearly conform their conduct to their knowledge of the Fourth Amendment, but are later told that they were mistaken and that the evidence seized will be suppressed. Far from deterring unlawful police conduct, such incidents often serve to make the police overly cautious in conducting legitimate investigations. Such a "chilling effect" upon police performance of their duties can only result in a loss to society as a whole. As one court has observed, "it

makes no sense to speak of deterring police officers who acted in the good-faith belief that their conduct was legal by suppressing evidence derived from such actions unless we somehow wish to deter them from acting at all." United States v. Williams, 622 F.2d 830, 847 (5th Cir. 1980), cert. den. 449 U.S. 1127 (1981).

In his concurring opinion in the case of U.S. v. Ceccolini, 435 U.S. 268 (1978), Chief Justice Burger noted that "the appropriate inquiry in every case in which a Defendant seeks the exclusion of otherwise admissible and reliable evidence is whether official conduct in reality will be measurably altered by taking such a course." 435 U.S. at 283.

Applying that inquiry to the facts of the instant case, it is clear that there is no logical rationale for altering or deterring any of the official conduct

which occurred in this case. The officers who arrested Quintero were confronted with a situation in which there was clear probable cause to arrest him for burglary. Quintero had been observed prowling around a house in a residential neighborhood on a weekday afternoon. Justifiably suspicious of his behavior, a neighbor called the police. When the police contacted Quintero shortly thereafter, he was standing at a bus stop in his undershirt; his shirt was covering a television set. These facts clearly provided a basis for the officers' belief that they had probable cause to make an arrest at that point. To act otherwise in such a situation would have been bad police work and a breach of the officers' duty to protect the community.

In the case of Stone v. Powell, supra, this court observed that "despite the broad deterrent purpose of the

exclusionary rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons." 428 U.S. at 486. "Application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." U.S. v. Calandra, 414 U.S. 338, 348 (1974), U.S. v. Ceccolini, supra, 435 U.S. at 275.

Recognizing that objective, this Court has adopted numerous exceptions to the Exclusionary Rule through the years. U.S. v. Havens, 446 U.S. 620 (1980); Walder v. U.S., 347 U.S. 62 (1954) (allowing the use of illegally seized evidence for the purpose of impeaching a Defendant who testifies on his own behalf; U.S. v. Ceccolini, supra, (admitting the testimony of a live witness derived from a concededly unconstitutional search); Michigan v. DeFillippo, 443 U.S. 31 (1979)

(admitting evidence seized by law enforcement officers acting in good-faith reliance on a statute later held to be unconstitutional); Brown v. Illinois, 422 U.S. 590 (1975) (declining to adopt a rule that would make inadmissible any evidence which comes to light through a chain of causation that began with an illegal arrest). The adoption of a good faith exception to the exclusionary rule in cases where officers acted in a good faith, objective belief that their conduct was reasonable is the next logical step in this course of reasoning.

In U.S. v. Ceccolini, supra, this Court acknowledged that any analysis of the Fourth Amendment exclusionary rule must recognize "... not only the benefits, but the costs, which are often substantial...." 435 U.S. at 275, 98 S.Ct at 1060. Amicus respectfully submits to the Court that this case is one in which

the price paid for application of the Exclusionary Rule is extremely high.

In his concurring opinion in the case of Illinois v. Gates, 103 S.Ct. 2317 (1983), Justice White concisely summarized the current problem posed by a strict application of the Exclusionary Rule:

> "The exclusion of probative evidence where the constable has not blundered not only sets the criminal free but also fails to serve any constitutional interest in securing compliance with the important requirements of the Fourth Amendment."

Justice White went on to state as follows:

> "[T]he exclusion of evidence is not a personal constitutional right but a remedy, which like all remedies, must be sensitive to the costs and benefits of its imposition. The trend and direction of our exclusionary rule decisions indicate not a lesser concern with safeguarding the Fourth Amendment but a fuller appreciation of the high costs incurred when probative, reliable evidence is barred because of investigative error. The primary cost, of course, is that the exclusionary rule interferes with the truthseeking

> function of a criminal trial by barring relevant and trustworthy evidence. We will never know how many guilty defendants go free as a result of the rule's operation. But any rule of evidence that denies the jury access to clearly probative and reliable evidence must bear a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness. I do not presume that modification of the exclusionary rule will, by itself, significantly reduce the crime rate - but that is no excuse for indiscriminate application of the rule."

Amicus wholeheartedly concurs with this analysis of the current state of the law surrounding the Exclusionary Rule, and respectfully urges this Court to reconsider and adopt a good faith exception to the Rule. Such an exception would allow the admission of relevant, probative evidence as long as the officer who seized that evidence is able to articulate his objective grounds for believing that he acted in accordance with

believing that he acted in accordance with

the law. The exception would not foster disregard for the law on the part of police officers, since ignorance of the requirements of the Fourth Amendment - with which the officer should have been familiar - would not warrant an exception to the Rule.

CONCLUSION

It is obvious that "the penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve." U.S. v. Ceccolini, supra, 435 U.S. at 279.

It is an unfortunate fact that public confidence in the workings of the judicial system has waned in recent years. One of the major reasons behind this erosion of confidence is the fact that the general public can neither comprehend nor accept the rationale behind excluding relevant,

probative evidence in criminal cases. This issue is no less critical to law enforcement officers, who are called upon to enforce the law but are often unable to anticipate or understand a subsequent suppression of the evidence obtained during their investigations.

The adoption of a good faith exception to the Exlusionary Rule will do much to advance the cause of good police work and to alleviate some of the public's dissatisfaction with and misunderstanding of the criminal justice system. It will also facilitate the trial process and provide some assurance that the search for truth by the trier of fact has not been deflected. Rakas v. Illinois, supra.

Amicus therefore respectfully requests that this Court adopt such a good faith exception to the Exclusionary Rule by reversing the decision of the Supreme Court of Colorado.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on the 12th day of September, 1983, I placed in the United States Mail, postage prepaid and properly sealed and addressed, a copy of the foregoing Brief of Amicus Curiae to the parties of record in this case.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

COMMONWEALTH OF MASSACHUSETTS, *Petitioner,*

—v.—

OSBORNE SHEPPARD, *Respondent.*

STATE OF COLORADO, *Petitioner,*

—v.—

FIDEL QUINTERO, *Respondent.*

UNITED STATES OF AMERICA, *Petitioner,*

—v.—

ALBERTO ANTONIO LEON, ET AL., *Respondents.*

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INTEREST OF AMICUS CURIAE

Amicus Curiae, as the duly elected County Attorney of Polk County, Iowa, encompassing the City of Des Moines, is charged with the principal responsibility for the prosecution of criminal offenders in Polk County, Iowa. In Illinois v. Gates, 81-430, amicus, as a concerned law enforcement official, filed a brief amicus curiae opposing the introduction of a good faith exception to the exclusionary rule. Amicus argued in Gates that the exclusionary rule provides a significant impetus toward adherence to Fourth Amendment values in the day to day administration of the criminal justice system. Rather than serving as an impediment to effective law enforcement, amicus has found the costs to public safety of the exclusionary rule virtually non-existent and has perceived

the rule as a principal contribution to increased police professionalism and training. Moreover, the proposed good faith exception to the exclusionary rule would inject new and difficult factual issues into the routine administration of the criminal justice system which would increase the resources needed to dispose of a case without providing additional protection against crime.

Amicus believes that pre-occupation with the politically charged issue of the exclusionary rule fosters the dangerous illusion that crime can be reduced by watering-down our constitutional heritage. In the opinion of amicus, the misplaced attempt to use the Constitution as a scapegoat for crime diverts attention and scarce resources from programs such as police training and penal reform which might, in fact, reduce crime. In the belief that the exclusionary rule

serves a critical educational and prophylactic role without posing a serious threat to the effective prosecution of crime and that its weakening would undermine constitutional liberty without alleviating our crime problem, amicus respectfully submits this brief amicus curiae.

ARGUMENT*

Two former members of this Court served as law enforcement officials for substantial periods of time prior to their respective appointments. Chief Justice Warren's service as an effective and energetic state prosecutor provided him with more first-hand experience in law enforcement than any Justice in the Nation's history. Justice Clark's service as Assistant Attorney General in charge of the

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*Letters of consent to the filing of this brief amicus curiae have been granted by the parties in Colorado v. Quintero; United States v. Leon; and Massachusetts v. Sheppard and have been lodged with the Court

Criminal Division and as Attorney General provided him with valuable insight into the particular complexities of Federal law enforcement. Though each harbored initial skepticism concerning the exclusionary rule, Chief Justice Warren joined Justice Clark's opinion for the Court in Mapp v. Ohio, 367 U.S. 643 (1961) because both came to recognize that the exclusionary rule had not affected their ability to prosecute crime while serving as a critical reinforcement of Fourth Amendment values.

Justices Warren and Clark came to understand, in part through their experiences as prosecutors, the unique role played by the exclusionary rule in establishing respect for the Fourth Amendment within the law enforcement community. Similarly, as a modern day prosecutor, amicus has come to regard the exclusionary rule as a linchpin of enlightened

and effective law enforcement.

I. THE EXCLUSIONARY RULE DOES NOT ACT AS A SUBSTANTIAL IMPEDIMENT TO THE CONVICTION OF THE GUILTY

Of the 12, 474 cases prosecuted in Polk County, Iowa, between July 1980 - September 1983, only 24 cases, including 15 arrests for possession of controlled substances such as marijuana, were dismissed because of the exclusionary rule.

The success of Polk County law enforcement officials in providing effective law enforcement while complying with Fourth Amendment values is attributable, first, to the growth of a professionalized law enforcement

system in which police officers are trained to respect the Fourth Amendment while pursuing investigative techniques which deal effectively with crime; and, second, to the precision with which this Court has restated governing Fourth Amendment principles over the last 15 years. The recognition of a good faith exception to the exclusionary rule would jeopardize both factors.

Polk County's experience is reflected by recent studies of the impact of the exclusionary rule on law enforcement. Eg. W. LaFave, Search and Seizure, § 1.2., n.9. (1981 Supp.); Brosi, A Cross-City Comparison of Felony Case Processing, (INSLAW 1979). As law enforcement authorities have gained a greater understanding of their responsibilities under the Fourth Amendment -- in large part because of pressures generated by the exclusionary rule -- the incidence of Fourth Amendment

violation has steadily decreased until, today, it does not play a substantial role in the prosecution of crimes against persons or property. Thus, in Nardulli, The Societal Cost of the Exclusionary Rule: An Empirical Assessment, 1983 American Bar Foundation Research Journal, No 3 (forthcoming), 7,500 felony prosecutions in 9 mid-sized counties in Pennsylvania, Michigan and Illinois were studied. Nardulli reports that although motions to suppress were brought in approximately 5 percent of the cases, only 52 motions were granted, resulting in the loss of 40 cases -- or 0.6 percent of the felony prosecutions. Morever, the successful motions were concentrated in the narcotics possession area, leaving the prosecution of crimes against persons or property virtually untouched by the exclusionary rule. Finally, of the few defendants freed because of the

rule's operation, Nardulli points out that fully two-thirds, if convicted, would have received sentences of less than two months, while only one could have expected a sentence of more than one year. See also, Davies, What We Know (And Still Need to Learn) About the Costs of the Exclusionary Rule: A Hard Look at the NIJ Study and a Review of Other Research, 1983 American Bar Foundation Research Journal, No. 3 (forthcoming). Thus, the Nardulli study merely confirms the experience of amicus in Polk County that careful training and good police work have combined to render it possible to have both effective law enforcement and strict compliance with Fourth Amendment norms. Such a degree of police professionalism was not, however, attained without cost and substantial effort. In the experience of amicus,

the existence of the exclusionary rule has acted as the principal encouragement of police training and professionalization. The realization that untrained police would produce arrests which would not stand up to a motion to suppress has led to a quantum upsurge in effective police training. Were the Court to recognize a good faith exception, the cost/benefit analysis of all police training programs would be re-cast. Indeed, such a rule might place a premium on police ignorance -- so long as it were "reasonable" ignorance. The net result would be an inevitable decline in police training and a consequent loss in productivity.

While increased training has played an important role in the decline of Fourth Amendment violations, this Court's success in articulating bright-line common sense norms

governing search and seizure has allowed both police and prosecutors to gauge with increasing certainty their Fourth Amendment obligations and to engage in effective law enforcement free from unduly technical constraints. Thus, by simplifying the area of the Fourth Amendment over a fifteen year period, the Court has expanded the range of clearly permissible activity and drastically reduced the need for a good faith exception. For example, in Terry v. Ohio, 392 U.S. 1 (1968) and Sibron v. New York 392 U.S. 40 (1968), street stops and defensive frisks were upheld on less than probable cause; in Schneckloth v. Bustamonte, 412 U. S. 218 (1973) an expansive definition of consent searches was adopted; in United States v. Robinson, 414 U.S. 218 (1973) and Gustafson v. Florida, 414 U.S. 260 (1973), broad power to search incident to

a lawful arrest was recognized; in South Dakota v. Opperman, 428 U.S. 364 (1976), and United States v. Ross, 102 S. Ct. 2157 (1982) inventory searches of the contents of automobiles were broadly authorized; in United States v. Miller, 425 U.S. 438 (1976) and Smith v. Maryland, 442 U.S. 735 (1979) broad areas of investigative searches were removed from Fourth Amendment scrutiny; in Rakas v. Illinois, 439 U.S. 128 (1978), United States v. Salvucci, 448 U.S. 83 (1980) and Rawlings v. Kentucky, 448 U.S. 98 (1980), standing to assert 4th Amendment violations was dramatically narrowed; and in United States v. Calandra, 414 U.S. 338 (1973) , the Grand Jury process was exempted from the exclusionary rule. Most significantly, in Hill v. California, 401 U.S. 797 (1971) and Franks v. Delaware, 438 U.S. 154 (1978), the Court stressed that

understandable factual errors do not undercut a finding of probable cause. Finally, in Illinois v. Gates, __ U.S. __, 103 S.Ct. 2317 (1983), the Court permitted probable cause to be found on the basis of an anonymous informant's tip, so long as the "totality of the circumstances" gave rise to a "common sense determination that there is a fair probability of criminal activity." Such a flexible test, buttressed by the extremely generous reading given to law enforcement concerns by the Court during the last 15 years, makes the recognition of a good faith defense both unnecessary and potentially dangerous. Given the flexibility of the probable cause standard, the introduction of a good faith defense is merely an invitation to water down the probable cause standard, since the Court has already made it clear that reasonable mistakes of law or fact

do not preclude a finding of probable cause. Eg. Franks v. Delaware, 438 U.S. at 165. See also, United States v. Robinson, 414 U.S. 218 (1973); Draper v. United States, 358 U.S. 307 (1959). If a good faith exception is broader than the generous scope for mistake already inherent in the existing definition of probable cause, the concept of probable cause will be subject to a form of verbal reductionism which must rob it of any objective meaning. Thus, since the Fourth Amendment as construed by the Court does not interfere with effective law enforcement, and since the recognition of a good faith defense would dilute the substantive meaning of probable cause while removing much of the existing incentive for police training, amicus urges the Court to resist the invitation to create an unnecessary and expensive hole in the Fourth Amendment.

II. THE EXCLUSIONARY RULE IS NECESSARY TO EMPHASIZE THE SERIOUSNESS OF OUR SOCIETY'S COMMITMENT TO FOURTH AMENDMENT VALUES

Police officers receive conflicting signals from the community. On the one hand, they are subjected to enormous -- and understandable -- pressures to prevent crime and to apprehend criminals; on the other hand, they are sternly admonished to conform their official behavior to limits established by the Bill of Rights. As with any group receiving conflicting signals, a suspicion may exist that one signal is to be ignored in the pursuit of the other. In the years prior to Mapp, the routine acceptance and use by many state courts of evidence gathered in violation of the Bill of Rights fostered the impression among segments of the law enforcement community that only lip service need be paid to the

restraining signals emanating from the Bill of Rights. The announcement by the Court in Mapp that the Fourth Amendment must be taken seriously was, thus, more than the mere establishment of a deterrent; it was a reinforcement and amplification of the signal that law enforcement in a free society is more complex than merely capturing the guilty. It was a firm admonition that even a worthy law enforcement end cannot justify an unconstitutional means. In the twenty-three years since Mapp, a generation of police officers has come to maturity in America, trained to recognize both sets of signals as meriting serious attention. It would constitute a law enforcement tragedy of the highest proportions if this Court were to weaken the signals which flow from the Bill of Rights when we are so close to achieving a professionalized law enforcement community.

This Court should harbor no illusions as to the psychological impact of a retreat from Mapp, whether couched in the rubric of good faith or some other protective wrapping. The signal to the law enforcement community, whether or not intended, would be a palpable one -- we no longer take Fourth Amendment as seriously. The inevitable result of such a signal must be a quantum upsurge in conduct violative of the Fourth Amendment. Amicus earnestly urges the Court not to send such a signal in the absence of persuasive evidence that the exclusionary rule as currently administered in fact constitutes a substantial impediment to the prosecution of crime.

III. RECOGNITION OF A GOOD FAITH DEFENSE TO THE EXCLUSIONARY RULE WOULD INTRODUCE UNNECESSARY COMPLEXITY INTO THE CRIMINAL PROCESS AND WOULD ENCOURAGE POLICE TO REMAIN IGNORANT OF EVOLVING FOURTH AMENDMENT DOCTRINE

A. The Good Faith Defense is Administratively Unworkable

As this Court has seen, the administration of a good faith defense is both time consuming and necessarily inexact. Thus, in grappling with the problems posed by a good faith defense to an action for damages for the violation of constitutional rights, this Court has been forced to consider, inter alia, allocation of the production and persuasion burdens, definition of the substantive standard, the probative force of relevant evidence and the possibility of derivative liability.

Even more difficult issues will be posed in the context of a suppression hearing where the central issue will become, not the substantive meaning of the Fourth Amendment, but the objective good faith of

the officer. As the Solicitor General correctly notes, it is, occasionally, a difficult task to determine what the Fourth Amendment requires, despite the matrix of precedent in which a case is embedded. It would, however, be far more difficult -- indeed it would be impossible -- to venture into wholly uncharted waters and explore the objective good faith of the officer. Every suppression hearing would necessarily become an inquiry into the training and knowledge of the arresting officer, to say nothing of the extent to which he had committed prior violations of the Fourth Amendment. The results would be wholly unpredictable and would require an extraordinary investment in time and resources.

B. The Good Faith Defense Places a Premium on Ignorance

Under current standards, when this Court announces a clarification of Fourth Amendment doctrine -- for example, the decision in Delaware v. Prouse, 440 U.S. 648 (1979), clarifying the extent to which searches of automobiles could take place -- police officers possess a powerful incentive to understand the clarified rule in order to assure that their investigative practices do not violate the Fourth Amendment. Not surprisingly, therefore, the existence of the exclusionary rule has stimulated an extraordinary attempt by police officers to master Fourth Amendment doctrine. If, however, illegally seized evidence is admissible so long as the officer acted in good faith, police officials might well be better served by ignoring the

complexities of Fourth Amendment doctrine, trusting instead in their good faith to validate their investigative methods. Thus, if in the wake of Delaware v. Prouse, a police department studiously ignored the implications of the opinion, a police officer conducting a search in violation of that case might nevertheless be acting in good faith because he had never been informed of the case. While the notion of objective reasonableness places limits on willful ignorance, a good faith defense would place a premium on providing as little training as possible to satisfy minimum objective standards. Any additional training would be correctly perceived as creating unnecessary problems for the police. See Kaplan, The Limits of the Exclusionary Rule, 26 Stan L. Rev. 1027, 1044 (1971). See also, American Law Institute, 48th Annual Meeting, pp 374-98 (1971).

CONCLUSION

For the above-stated reasons, this Court should reject the suggestion that illegally seized evidence may be admitted so long as it was seized in good faith.

Respectfully submitted

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In the

Supreme Court of the United States

OCTOBER TERM, 1983

COMMONWEALTH OF MASSACHUSETTS, Petitioner,

vs.

OSBORNE SHEPPARD, Respondent.

STATE OF COLORADO, Petitioner,

vs.

FIDEL QUINTERO, Respondent.

UNITED STATES OF AMERICA, Petitioner,

vs.

ALBERTO ANTONIO LEON, et al., Respondents.

On Writs of Certiorari to the Supreme Judicial Court of Massachusetts, the Supreme Court of Colorado, and the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE ILLINOIS STATE BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether *Illinois* v. *Gates*, ... U.S. ..... (No. 81-430, 1983), has obviated the need to consider a "reasonable good faith mistake" exception to the Fourth Amendment exclusionary rule.

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BRIEF OF THE ILLINOIS STATE BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE ILLINOIS STATE BAR ASSOCIATION

The Illinois State Bar Association is a state-wide voluntary professional association of attorneys of the

State of Illinois. Its membership consists of approximately 25,000 lawyers and judges, and includes the majority of Illinois attorneys. The Association has traditionally taken an active role in public education on legal issues and legal reform in the public interest. It maintains special section councils in areas of substantive law, including criminal justice.

The Association, through the section council on criminal justice, has frequently examined and debated the exclusionary rule. In December of 1981, the Board of Governors of the Association adopted a resolution supporting continuation of the present exclusionary rule and subsequently authorized filing of an *amicus curiae* brief in this Court supporting continuation of the rule in its present form.

During the Court's October, 1982 term, the Association filed a brief as *amicus curiae* in *Illinois* v. *Gates,* No. 81-430.

The Board of Governors has specifically authorized the preparation and filing of an *amicus curiae* brief in support of Respondents in the present cases.

SUMMARY OF ARGUMENT

The time for a "reasonable good faith mistake" exception to the exclusionary rule is over. The claimed benefits of the proposed exception cannot survice this Court's decision in *Illinois* v. *Gates,* ..... U.S. ....., 103 S.Ct. 2317 (No. 81-430, 1983). The proposal found its justification in the supposed futility of suppressing evidence where the searching officer believed, both subjectively and in objectively reasonable good faith, that his actions did not violate the Fourth Amendment.

The concept of an objectively reasonable good faith mistake is meaningless in light of *Gates*, which abandoned the technical analysis of *Aguilar* v. *Texas*, 378 U.S. 108 (1964) and *Spinelli* v. *United States*, 393 U.S. 410 (1969), in favor of the original "totality of circumstances" test of earlier cases such as *Brinegar* v. *United States*, 338 U.S. 160 (1949). In determining probable cause the courts look once again to "probabilities" and "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Law enforcement officers and magistrates look to "common-sense conclusions about behavior."

Probable cause exists, under *Gates*, where the "practical, common-sense" consideration of all the circumstances shows "a fair probability that contraband or evidence of a crime will be found in a particular place."

Under this simplified test for probable cause there is no room for a mistake which is made in good faith and yet is, at the same time, objectively reasonable.

Gates has incorporated objective reasonableness into the test of probable cause itself. To go further and hold that the remedy of exclusion should be unavailable to redress a search which fails to meet this test would entrust the Fourth Amendment to the discretion of the police.

Although the exclusionary rule is not made explicit by the Fourth Amendment, that Amendment does explicitly require probable cause as the precondition of a lawful search, and it unquestionably presupposes that its commandment will be obeyed. Obedience demands enforcement, which in turn demands a remedy.

The exclusionary rule is the only fair, practical and effective remedy for Fourth Amendment violations. It is directed toward the illegal evidence, not toward punishment of the erring officer.

The good faith belief of the searching officer is immaterial where the search is conducted pursuant to a warrant. Where the search is without a warrant, a good faith exception threatens the integrity of the probable cause standard.

Under exceptional circumstances, a mere clerical error or oversight in an otherwise valid warrant may not involve any Fourth Amendment violation and would not justify exclusion of evidence. Even in this situation, however, good-faith analysis is not helpful.

ARGUMENT

I.

CREATION OF A "REASONABLE GOOD FAITH MISTAKE" EXCEPTION TO THE FOURTH AMENDMENT EXCLUSIONARY RULE IS FORECLOSED BY THIS COURT'S RECENT DECISION IN ILLINOIS V. GATES.

The "reasonable good faith mistake" exception is an idea whose time is over. There is no place for the contemplated exception under the practical, common-sense standard of probable cause re-enunciated by this court in *Illinois* v. *Gates,* ..... U.S. ....., 103 S.Ct. 2317 (No. 81-430, 1983)

By rejecting the highly analytical system of probable cause determination which evolved after *Aguilar* v. *Texas,* 378 U.S. 108 (1964) and *Spinelli* v. *United States,* 393 U.S. 410 (1969) and incorporating objective reasonableness into the probable cause determination itself, *Gates* has made an objectively reasonable mistake a logical and practical impossibility. Freeing the magistrate, any by extension the officer acting without a warrant, to exercise discretion based upon the totality of the circumstances, *Gates* has also rendered the uncertainty inherent in a "good faith mistake" exception intolerable.

Whatever the justifications for the exception may have been in the past, they cannot survive *Gates.* Whatever the excessive costs of the exclusionary rule may have been in the past, *Gates* has cured them. A double cure, combining the restated probable cause standard with virtual elimination of the remedy for violation, is far

more dangerous than any defects of the exclusionary rule. The complaints asserted by petitioners have been remedied by *Gates*.

A.

THERE CAN BE NO SUCH THING, UNDER GATES, AS AN OBJECTIVELY REASONABLE GOOD FAITH MISTAKE OF PROBABLE CAUSE.

Gates reemphasized what had often been forgotten in Fourth Amendment analysis; namely, that the probable cause standard itself incorporates the concept of objective reasonableness. Quoting from *Brinegar* v. *United States*, 338 U.S. 160 (1949), *Gates* reminds us that,

> "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* at 175, quoted in *Gates*, 103 S.Ct. at 2328.

This lesson runs throughout the *Gates* decision. "[P]robable cause is a fluid concept — turning on the assessment of probabilities in particular factual contexts — not readily, or even usefully, reduced to a set of legal rules." 103 S.Ct. at 2328. Veracity, reliability and basis of knowledge are "better understood as relevant considerations in the totality of circumstances analysis that traditionally has guided probable cause determinations." 103 S.Ct. at 2329.

Putting aside multiple-prong and convoluted tests, designed to guide the magistrate's discretion but in the end becoming an overgrown impediment to it, the Court once

again looks to the heart of the determination, concluding that where there exists a "substantial basis for . . . conclud[ing] that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." 103 S.Ct. at 2331.

In a summary of its ruling, *Gates* states,

> ". . . [W]e conclude that it is wiser to abandon the 'two-pronged test' established by our decisions in *Aguilar* and *Spinelli*. In its place we reaffirm the totality of the circumstances analysis that traditionally has informed probable cause determinations. [citations omitted] The task of the magistrate is simply to make a practical common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." 103 S.Ct. at 2332.

Lest this deference to the practical discretion of the magistrate be misconstrued as a reduction in the actual standard of probable cause, *Gates* warned that "[i]n order to ensure that . . . an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued." 103 S.Ct. at 2332.

Although a bare-bones conclusory affidavit is obviously inadequate, merely going beyond this is not necessarily sufficient. The capsule rule of *Gates* is that when an affidavit offering more than mere conclusions is tested, the same level of probable cause as before is to be sought by a "flexible, common-sense" standard, rather than by means of rigidly prescribed rules. 103 S.Ct. at 2333.

With its emphasis on the flexible, the common-sense, the practical, and its explicit reaffirmation of the "reason-

able and prudent man" standard of *Brinegar, Gates* has incorporated the concept of "objective reasonableness" into the determination of probable cause itself. It is difficult to see how probable cause could ever be found under *Gates* if the totality of the circumstances did not lead to an objectively reasonable belief adequate to overcome the suspect's Fourth Amendment rights. And an absence of practical, common-sense, probable cause would render an objectively reasonable good faith mistake a contradiction in terms. Subjective good faith mistake there well might be, but no responsible advocate of the good faith exception has had the temerity to suggest that this should be adequate to avoid suppression. Cf. *Illinois* v. *Gates,* concurring opinion of Justice White.

B.

RESTRICTION OF THE EXCLUSIONARY RULE IN THE WAKE OF GATES WOULD CONFUSE AND WEAKEN THE MEANING OF PROBABLE CAUSE.

Nothing in *Gates* was intended to dilute or diminish the meaning of probable cause. Part III of the Court's opinion leaves no doubt that, although the method for determining that standard has been simplified and clarified, the actual standard has in no way been reduced.

Nevertheless, just as certain language in *Aguilar* and *Spinelli* has been misread into a test of untenable rigidity, the emphasis in *Gates* on flexible, practical common-sense poses the danger of unduly lax construction. The concurring opinion of Justice White foresees precisely this danger and warns, ". . . as I read the majority opinion, it appears that the question whether the probable cause standard is to be diluted is left to the common-sense judgments of issuing magistrates." 103 S.Ct. at

2350; Justice White, concurring. The dissenting opinion of Justice Brennan expresses concern that "words such as 'practical,' 'non-technical,' and 'common-sense,' as used in the Court's opinion, are but code words for an overly permissive attitude towards police practices in derogation of the rights secured by the Fourth Amendment," 103 S.Ct. at 2359; Justice Brennan, dissenting. Although the opinion of the Court makes it clear that no such derogation is intended, 103 S.Ct. at 2333-2334, the fact remains that *Gates,* like its predecessors, is subject to misconstruction and overly permissive interpretation by lower courts, magistrates and police agencies.

Yet with *Gates* hardly six months old, this Court is once again invited to engraft a large, vague and illogical exception onto the exclusionary rule.

The case for restricting the exclusionary rule is stated in Justice White's concurrence in *Gates.* But Justice White proposed modification of the rule as an alternative to abandonment of *Aguilar* and *Spinelli.* The Court chose instead to restrict *Aguilar* and *Spinelli,* and left the exclusionary rule intact.

Petitioners continue, however, to press for a good faith exception as though *Gates* had never been decided. Thus, although the brief of the United States is replete with citations to the concurring opinion in *Gates,* it pays scant heed to the opinion of the Court, and it never comes to grips with the fact that *Gates* has radically altered the context in which the future of the exclusionary rule must be judged.

C.

GATES HAS OBVIATED THE NEED TO CONSIDER A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE IN WARRANT CASES.

Under *Gates*, the totality of the circumstances must be viewed as "the factual and practical considerations of everyday life on which reasonable and prudent men . . . act." 103 S.Ct. at 2328. If this test, which includes the concept of objective reasonableness at its very heart, is not met, then no amount of good faith on the part of the police officer can make the search reasonable or constitutional.

Even before the *Gates* decision, the application of a "good faith mistake" test to the warrant situation was fraught with dangers and difficulties. (see Argument *II., infra.*) In light of that decision it is pointless. Objective reasonableness is part of probable cause. A search without probable cause can never be objectively reasonable.

D.

GATES HAS OBVIATED THE NEED TO CONSIDER A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE IN WARRANTLESS SEARCH CASES.

Even though *Gates* was decided in the context of a search based upon a warrant, it obviates the need to consider a good faith exception in warrantless search cases as well. Whether a search is conducted with a warrant or without, probable cause remains probable cause. The practical, common-sense standard employed by the magistrate in passing on a warrant application must, of necessity, be employed by a judge reviewing the discretion of an officer acting under an exception to the warrant requirement.

And if under the totality of circumstances test in a warrantless search the searching officer fails to meet the standard of a reasonable and prudent man, *Brinegar* v. *United States,* 338 U.S. 160, 171 (1949), *Draper* v. *United States,* 358 U.S. 307 (1959), *Illinois* v. *Gates,* ..... U.S. ....., 103 S.Ct. 2317 (1983), though he may have had good faith, that good faith cannot be reasonable.

II.

WHERE A SEARCH IS UNDERTAKEN PURSUANT TO A WARRANT THE GOOD FAITH OF THE POLICE OFFICER IS IRRELEVANT AND THE EXISTENCE OF A "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE HAS NO APPLICATION.

Even before *Gates,* the good faith mistake exception made no sense in a warrant case. The subjective good faith or bad faith of a police officer is irrelevant where a search and seizure is conducted pursuant to a warrant. Although a perjured affidavit may render invalid a warrant which bears no defect on its face, *Franks* v. *Delaware,* 438 U.S. 154 (1978), the opinion of the officer as to whether the magistrate was right or wrong in issuing the warrant has no other bearing on the application of the exclusionary rule.

Where a warrant has been sought and actually has issued the officer's opinion as to the reasonableness of the search or of the warrant is of no importance. There is no reason, in law, logic or policy to countenance a rule which places on the police officer the obligation or duty to second guess the magistrate or sit in his squad car as a court of review over Fourth Amendment determinations.

The true issue in a warrant case has nothing to do with good faith or reasonable mistakes on the part of the police. It is instead whether, regardless of the subjective beliefs of the police officer, evidence seized pursuant to a warrant issuing on inadequate facts is to be immune from exclusion.

If the warrant is valid it is of no consequence that the officer believes the judge wrong. And if the warrant is invalid it is of no matter that the officer assumes, as he naturally would, that the judge was correct. The officer's duty is to assemble such evidence as is available in support of the proposed search, reduce it to the form of an affidavit, and submit it to a magistrate for decision as to whether or not the constitutional standard has been met. Once the affidavit has been submitted the officer's Fourth Amendment duty has been fulfilled, and the officer has no choice but to accept the magistrate's ruling and search or not search as the decision may be.

Once the warrant has issued the inquiry must go not to the beliefs of the officer but rather to the correctness or error of the magistrate. If probable cause has been shown then the Fourth Amendment rights of the subject of the search have been protected. If, on the other hand, the magistrate has signed a warrant without probable cause then the subject has suffered an infringement of rights for which a remedy must be available. It is a most peculiar notion that vindication of those rights should be barred because the officer on his way to execute the warrant is unaware that it is defective. The error and the infringement has been made by the court and it makes no sense to create a level of artificial insulation between the court and its error by creating a rule that if the ministerial officer who serves and exe-

cutes a bad warrant upon order of court believes it valid then the remedy which would otherwise follow is to be denied.

The continued general application of the exclusionary rule as the remedy for illegal searches and seizures based upon judicial warrants depends upon whether the rule is a necessary and constitutionally mandated corollary to the Fourth Amendment or whether, if not, it is nevertheless the most practical and reasonable remedy for violation of Fourth Amendment rights. The application in any individual case cannot, and should not, depend upon the subjective opinions of the police officer who obtains or executes the warrant as to whether it is valid or reasonable.

III.

EXCLUSION OF UNLAWFULLY SEIZED EVIDENCE REMAINS THE BEST AND MOST APPROPRIATE REMEDY WHERE THE SEIZURE TAKES PLACE PURSUANT TO A WARRANT ERRONEOUSLY ISSUED UPON SOMETHING LESS THAN THE CONSTITUTIONALLY MANDATED STANDARD OF PROBABLE CAUSE.

The probable cause standard for searches and seizures is the explicit mandate of the Constitution. The Fourth Amendment plainly states that ". . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . ." U.S. Constitution, Amdt. IV. Whether the exclusionary rule is similarly mandated is less clear. Early cases, including the seminal *Weeks* v. *United States,* 232 U.S. 383 (1914), view exclusion of illegally seized evidence as flowing inevitably from the Fourth Amendment, while such later cases as *United States* v. *Calandra,* 414 U.S. 338 (1974) and *Stone* v. *Powell,* 428

U.S. 465 (1976) have construed the rule as a judicial remedy not necessarily required by the Constitution.

However that may be, it cannot be denied that probable cause as the basis of every warrant is no mere judicial construction but is as clear a command as any to be found in the entire Constitution. And the Fourth Amendment requirement that searches and seizures shall not be "unreasonable" has been consistently held to mean that the same standard of probable cause must be met whether the search and seizure is conducted with a warrant or without; compare *Carroll* v. *United States,* 267 U.S. 132 (1925)("reasonable grounds") with *Husty* v. *United States,* 282 U.S. 694 (1931)("probable cause") and *Brinegar* v. *United States,* 338 U.S. 160 (1949).

We need not disagree with cases holding that exclusion is not applicable to proceedings before a grand jury, *Calandra,* or to collateral review, *Stone,* or to a civil action, *United States* v. *Janis,* 428 U.S. 433 (1976), to conclude that they are not good guidance for criminal cases in which the government seeks to admit unlawfully seized evidence into the very prosecution for which the seizure was undertaken. It may be true that in the *Calandra, Stone* and *Janis* situations the benefits of exclusion are so slight and attenuated that the rule's effect on the evidence becomes the more important consideration.

This is not so where the fruits of an unlawful search are offered in the initial criminal prosecution. It is in that context that the warrant is actually sought and the existence or nonexistence of probable cause determined. To admit or refuse evidence in other types of proceed-

ings will have little effect on the fate of the probable cause standard. But to allow the results of Fourth Amendment violations into the initial criminal prosecution will have an immediate and deleterious effect on the very concept of probable cause and on the ability of the courts to enforce the protection of the Fourth Amendment.

The exclusionary rule has the merit of providing a remedy for any unlawful search and seizure, not merely for one which is intentional or extreme. If probable cause is to have any meaning it must be protected from well intentioned misapplication as well as from deliberate flouting. A substitute rule which would provide, as most suggested substitutes have, for some form of damages or discipline against the searching officer is both cruelly inappropriate and socially dangerous when applied in the case of accidental error. It has been objected that the exclusionary rule does not deserve to be applied to a good faith error. Yet it is far more unfair to impose damages or punishment upon the individual officer guilty of a well-motivated mistake.

The most dangerous feature of a rule imposing sanctions on the officer is that it will intimidate the police from performance of their duties. Under the present rule, the officer is not afraid to act in a doubtful case, knowing that if he errs the remedy will be directed where it belongs—against the improperly obtained evidence and not against him. Under virtually every other proposal the remedy is directed against the officer, with the result that either no remedy at all will exist for an honestly meant violation of a basic right, or else that because a remedy is available the police will be reluctant to leave their squad cars.

The exclusionary rule remains superior to any alternative, and the decision of almost every state to stay with the rule when it was not required remains persuasive evidence of this superiority.

The exclusionary rule for search and seizure cases has been the law in the federal courts since 1914, *Weeks* v. *United States,* 232 U.S. 383 (1914), but it did not become binding upon the states until forty-eight years later, *Mapp* v. *Ohio,* 367 U.S. 643 (1962). Throughout the intervening period the states were free to devise any other means they might choose to enforce constitutional privacy protections. Indeed, between 1949 and 1962 it was the explicit rule established by this court that although the Fourth Amendment was applicable to the states through the Fourteenth Amendment, the exclusionary rule was not. *Wolf* v. *Colorado,* 338 U.S. 25 (1949).

The absence of response to *Weeks* and *Wolf* suggests that there is no satisfactory substitute and that the exclusionary rule, whatever its shortcomings may be, remains preferable to any alternative, cf. *Elkins* v. *United States,* 364 U.S. 206 (1960).

Opponents of the exclusionary rule point to the social cost of not using presumably reliable evidence only because it has been improperly obtained. There is, to be sure, an unascertainable cost in making such evidence unavailable. It is not the exclusionary rule, however, which imposes that cost. It is the requirement that a search not take place in the absence of probable cause. Those who deplore the cost have a quarrel not with the procedural rule of exclusion, but with the substantive rule of the Fourth Amendment. Their remedy is not

to overrule *Weeks* or *Mapp* but to remove the requirement of probable cause from the Constitution.

Accusations against the exclusionary rule based upon its supposed cost are revealed as fallacious in an excerpt from a recent and highly respected treatise, La Fave on *Search and Seizure,*

> "The nature of the exclusionary rule is such that it makes the cost of honoring the Fourth Amendment apparent. As Professor Kaplan has observed, 'by definition it operates only after incriminating evidence has already been obtained' and thus 'flaunts before us the cost we must pay for the fourth amendment guarantees.' But it is not correct that the cost is attributable to the exclusionary rule. Those who drafted the Fourth Amendment may not have specifically contemplated the exclusionary sanction, but surely they expected the commands of the Amendment to be adhered to. 'To the extent that the police obey the constitutional commands, the community foregoes such advantages as it might enjoy from evidence that can only be obtained illegally.' It may fairly be said, then, as Justice Traynor once observed, that the cost argument was rejected when the Fourth Amendment was adopted." La Fave, *Search and Seizure,* Vol. 1, p. 23, (1978).

Nowhere is the absence of an alternative to the exclusionary rule so apparent as in the final pages of the Government's brief. (Brief of the United States, at 86-88) The plain fact is that we maintain the exclusionary rule because every alternative proposed to date is worse.

There may be alternative remedies for willful violations. The offending officer could be reprimanded, suspended, demoted, dismissed, fined or, in the most outrageous cases,

prosecuted and imprisoned. And where the subject of the search turns out to be innocent the civil tort remedy may have occasional practical value. But where, as is more often the case, the violation is a blunder, however severe, no other realistic remedy exists.

The government falls back on the assertion that existence of the exclusionary rule has discouraged the evolution of other remedies, a claim which is factually untrue and logically upside-down.

No issue of criminal procedure has received more attention and argument than the exclusionary rule. The challenge to find something better has been before the legal community since 1914, *Weeks* v. *United States,* 232 U.S. 383, and has been looking fifty state legislatures squarely in the eye since 1962, *Mapp* v. *Ohio,* 367 U.S. 643. For years members of this Court have indicated less than complete happiness with the rule, see e.g. *Stone* v. *Powell,* 428 U.S. 465 (1976), *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, (1971), Burger, C.J., dissenting. No good answer has been given. During oral argument in *Gates* the Solicitor General was unable to suggest an alternative in response to a direct invitation from Justice Marshall.

IV.

THE FEDERAL EXCLUSIONARY RULE EVEN IN ITS PRESENT FORM IS INAPPLICABLE TO MASSACHUSETTS V. SHEPPARD AND THIS UNIQUE CASE IS AN INAPPROPRIATE VEHICLE FOR RE-EXAMINATION OF THE RULE.

The exclusionary rule is a remedy for violations of the Fourth Amendment. Where no Fourth Amendment

violation has occurred the federal exclusionary rule, even its present form, does not apply. The Supreme Judicial Court of Massachusetts was in error in invoking the rule as a matter of federal constitutional law in the *Sheppard* case, 82-963. Because invocation was unnecessary even under present law, *Sheppard* is an improper vehicle for re-examination of that rule.

In *Sheppard* a warrant application was presented which fully satisfied the requirements of both probable cause and specificity. A magistrate reviewed and approved the application, and his determination that all constitutional requirements were properly met is not disputed.

Due to an exceptional clerical oversight, the face of the warrant failed to reflect the specificity which the magistrate had in fact reviewed and found. The searching officers, however, relied on their information as contained in the application rather than on the interlineated warrant form. The person searched did not rely on the specificity language of the warrant form.

There is no Fourth Amendment violation on these facts. Where both probable cause and specificity have been fully demonstrated to the magistrate, a mere clerical oversight on the face of the warrant, noticed by no one and relied upon by no one, has transgressed no constitutional right. Exclusion of evidence may have been required by Massachusetts law. It was not required by the Fourth Amendment.

Amicus respectfully calls the Court's attention to a statute from its own state which is the appropriate method of handling such a case. Ill.Rev.Stat., Ch. 38, § 108-14, provides:

> No warrant shall be quashed nor evidence suppressed because of technical irregularities not affecting the substantial rights of the accused.

The good faith beliefs of the officers, reasonable or not, are immaterial on these facts because the search was not unconstitutional. It would be a mistake for this Court to misuse a valid search mildly tainted by nonprejudicial clerical error as a vehicle for re-examining so important a doctrine as the exclusionary rule.

CONCLUSION

The exclusionary rule should not be modified, and the proposed "reasonable good faith mistake" exception should be firmly rejected.

Amicus respectfully suggests that *Massachusetts* v. *Sheppard* does not involve any Fourth Amendment violation; that invocation of the exclusionary rule by the Supreme Judicial Court of Massachusetts was not required by federal constitutional law; and that application of "reasonable good faith mistake" analysis to this case is highly inappropriate and would constitute an advisory opinion.

Amicus believes that consideration of the searching officer's belief as to the validity of a regularly issued warrant is not proper and that "reasonable good faith mistake" analysis has no place in review of a search pursuant to a warrant.

Amicus also respectfully submits that *Gates* v. *Illinois* has obviated any need to consider a "reasonable good faith mistake" exception. Whatever the case may have been before, *Gates* has made modification of the exclusionary rule unnecessary, unwise and illogical.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF COLORADO, *Petitioner*,

v.

FIDEL QUINTERO, *Respondent*.

UNITED STATES OF AMERICA, *Petitioner*,

v.

ALBERTO ANTONIO LEON, *et al.*, *Respondents*.

On Writs Of Certiorari To The Supreme Court Of Colorado And The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE AMERICAN CIVIL LIBERTIES UNION, AND THE SOUTHERN POVERTY LAW CENTER, AS *AMICI CURIAE*

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BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE AMERICAN CIVIL LIBERTIES UNION, AND THE SOUTHERN POVERTY LAW CENTER, AS *AMICI CURIAE*

INTEREST OF AMICI CURIAE

This brief is respectfully submitted on behalf of the National Association for the Advancement of Colored People, the American Civil Liberties Union, and the Southern Poverty Law Center.[1]

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[1] This brief is filed with the consent of the parties; letters consenting to the filing of this brief have been lodged with the Clerk.

The National Association for the Advancement of Colored People (NAACP) was formed in 1909 as a non-profit membership corporation. It has nearly 2000 branches throughout the nation and a 1982 membership of approximately 450,000. The basic aims and purposes of the NAACP are to secure the elimination of all racial barriers that deprive black citizens of the privileges and burdens of equal citizenship rights in the United States. To this end, the NAACP devotes much of its funds and energies to an extensive program of litigation in pursuit of its declared purposes. The Association has a particular interest in these cases because of its concern that the rights under the Fourth Amendment of all citizens, and particularly minority citizens, be preserved and enforced by the courts.

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of over 250,000 members dedicated to protecting and preserving the liberties safeguarded by the Constitution and the Bill of Rights. The prohibition against unreasonable searches and seizures contained in the Fourth Amendment is critically important among those safeguards. The ACLU has participated in many of the leading cases in which this Court has given shape and content to the Fourth Amendment's guarantee. In *Mapp* v. *Ohio*, 367 U.S. 643 (1961), the ACLU filed the only brief before the Court urging application of the exclusionary rule to the States, and was permitted by the Court to raise the point at oral argument. 367 U.S. at 646 n.3. The ACLU appeared as *amicus curiae* in *Illinois* v. *Gates*, ___ U.S. ___, 103 S. Ct. 2317 (1983), and appears again here because of its belief that these cases present the most serious risk in recent years to the preservation of the requirements of the Fourth Amendment, and therefore to the right of all

Americans to be secure against unreasonable searches and seizures.

The Southern Poverty Law Center (the Center) is a non-profit law firm, located in Montgomery, Alabama, that specializes in the defense and enforcement of constitutional rights, particularly those of the less fortunate, throughout the southeastern United States. The Bill of Rights serves as the foundation for the Center's extensive constitutional litigation. The Center is convinced that the adoption of a "reasonable mistake" modification in these cases would erode the fundamental protections of the Fourth Amendment. The Center seeks to take an active stance against this threat of constitutional erosion through participation as *amicus curiae* in these cases.

The NAACP, the ACLU, and the Center hope that their participation will be of material assistance to the Court in weighing the impact upon Fourth Amendment protections threatened by the proposed modification of the exclusionary rule.

SUMMARY OF ARGUMENT

The cases now before the Court pose a question critical to the continued effectiveness of the Fourth Amendment. Adoption of the proposed modification of the exclusionary rule will go far to nullify the constitutional requirement of probable cause and to make all citizens less secure against unreasonable searches and seizures.[2]

A. The Fourth Amendment prohibits unreasonable searches and seizures. The touchstone of reasonableness

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[2] This brief is limited to *Colorado* v. *Quintero*, No. 82-1711, and *United States* v. *Leon*, No. 82-1771, because the ACLU directly represents the Respondent in *Massachusetts* v. *Sheppard*, No. 82-963, the third companion case before the Court.

is probable cause to believe that a crime has been committed. The probable cause standard reflects the judgment of the Framers of the Constitution as to the proper balance between the competing interests of personal privacy and effective law enforcement. This standard is a "practical, nontechnical conception" dealing with "the factual and practical considerations of everyday life," and it accordingly allows room for the mistakes of "reasonable men, acting on facts leading sensibly to their conclusions of probability," *Brinegar* v. *United States*, 338 U.S. 160, 175-76 (1949). Since the probable cause standard calls only for "a practical, common-sense decision," *Illinois* v. *Gates*, ____ U.S. ____, 103 S. Ct. 2317, 2332 (1983), there is adequate flexibility within constitutional bounds to accommodate the reasonable needs of effective law enforcement.

B. The exclusionary rule of *Weeks* v. *United States*, 232 U.S. 383 (1914), held applicable to the States in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), forbids the use of unconstitutionally obtained evidence against the victim of the violation during the prosecution's case-in-chief and thus effectuates the Fourth Amendment's prohibition against unreasonable searches and seizures by "compel[ling] respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U.S. 206, 217 (1960).

Modification of the exclusionary rule by engrafting upon it an exception for so-called "reasonable mistakes" by police officers will encourage violations of the Fourth Amendment. It is pointless to speak of a "reasonable" violation of the flexible probable cause standard, which already allows room for reasonable misjudgments. It is inevitable that the proposed modification would nullify the requirement of probable cause by encouraging police

officers to act on mere suspicion with the knowledge that the "reasonable mistake" modification will make the illegally seized evidence admissible.

The further proposal that unconstitutionally obtained evidence be admissible whenever police have obtained a warrant would make magistrates' judgments substantially unreviewable; an invalid warrant would constitute adequate support for the invalid search and seizure since the police officer's "mistake" would be deemed reasonable and the magistrate's mistake in issuing the warrant would be ignored. The protections of the Fourth Amendment are too important to be left to the unreviewable discretion of police officers and magistrates in this manner.

C. No decision of this Court supports the proposed modification of the exclusionary rule. Limited uses of illegally obtained evidence have been authorized in peripheral situations where the incremental deterrent effect of excluding the evidence would have added only slightly, if at all, to the basic deterrence achieved by exclusion of the evidence from the government's case-in-chief. *See United States* v. *Calandra*, 414 U.S. 338 (1974); *United States* v. *Janis*, 428 U.S. 433 (1976); *Stone* v. *Powell*, 428 U.S. 465 (1976); and *United States* v. *Havens*, 446 U.S. 620 (1980). These decisions provide no basis for significantly weakening the exclusionary rule in the case-in-chief itself.

Petitioners' contention that the exclusionary rule should not be applied to "reasonable mistakes" has been rejected by the Court. In *United States* v. *Johnson*, 457 U.S. 537 (1982), dealing with the retroactivity of the ruling in *Payton* v. *New York*, 445 U.S. 573 (1980), that a warrant is required for a routine felony arrest in the suspect's home, the Court, finding that the issue had been

"unsettled" prior to *Payton*, rejected that circumstance as a ground for denying retroactivity to the *Payton* holding. The Court pointed out that if rulings resolving unsettled Fourth Amendment issues were made nonretroactive, then "in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior." 457 U.S. at 561. The policies of the exclusionary rule are similarly well served by application of the rule in the many cases involving arrests and searches made near the dividing line between probable cause and mere suspicion. As retired Justice Potter Stewart has recently written, "if this exception were adopted, police officers might shift the focus of their inquiry from 'what does the Fourth Amendment require?' to 'what will the courts allow me to get away with?' It seems inevitable in these circumstances that adoption of the proposed exception would result in more Fourth Amendment violations." Stewart, *The Road to Mapp* v. *Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1403 (1983).

ARGUMENT

Adoption Of The Proposed "Reasonable Mistake" Modification Of The Exclusionary Rule Would Be In Dereliction Of This Court's Duty To Preserve For All Citizens The Freedom From Unreasonable Searches And Seizures Guaranteed By The Fourth Amendment

Introduction

The exclusionary rule cases before the Court present a question of overriding importance concerning this Court's role as guardian of the freedoms enshrined in the Constitution. As we shall demonstrate, the proposed "reasonable mistake" modification presents a grave

threat to the Fourth Amendment freedoms of all citizens. The adoption of the proposed modification would signal to law enforcement officials that the Court will not insist on compliance with the Fourth Amendment requirement of probable cause but rather is prepared to encourage law enforcement officials to proceed with arrests and searches of citizens on mere suspicion. We urge the Court to reaffirm the importance of the Fourth Amendment protection of probable cause by emphatically rejecting the modification of the exclusionary rule now proposed.

A. The Fourth Amendment Reflects The Carefully Considered Judgment Of Our Founding Fathers That Arrests And Searches Should Be Undertaken Only In Accordance With the Flexible Standard Of Probable Cause

The Fourth Amendment to the Constitution, applicable to the States through the Fourteenth Amendment, provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourth Amendment prohibits only "unreasonable" searches and seizures. This Court has repeatedly held that an arrest or search can be reasonable only if probable cause exists.[3] The need for probable cause is clear whether the police officer is entitled to proceed without an arrest or search warrant, or is acting pursuant to a

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[3] We shall address in this brief only full-blown arrests and searches, not the brief and limited intrusions upon privacy (far short of full arrests and searches) that the Court has authorized in *Terry* v. *Ohio*, 392 U.S. 1 (1968), and its progeny.

warrant. *See Dunaway* v. *New York*, 442 U.S. 200 (1979); *Illinois* v. *Gates*, ____ U.S. ____, 103 S. Ct. 2317 (1983).

Probable cause is the cornerstone of substantive Fourth Amendment protection and was designed by the Framers of the Constitution to reflect a proper balance between the competing interests of personal privacy and law enforcement. As this Court has recognized, the "long-prevailing standards" of probable cause "seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection." *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949). As the Court observed in *Dunaway*, "[t]he standard of probable cause thus represented the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest 'reasonable' under the Fourth Amendment." *Dunaway* v. *New York*, *supra*, 442 U.S. at 208. The standard also represents a recognition that searches made on less than probable cause are more likely than those with probable cause to intrude upon the privacy of innocent persons.

Probable cause is a common-sense concept that does not require certainty of guilt. As stated in *Brinegar*:

> "Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." 338 U.S. at 175-76, *quoting Carroll* v. *United States*, 267 U.S. 132, 162 (1925).

The Court's most recent exposition concerning probable cause occurred only last Term in *Illinois* v. *Gates*, ____ U.S. ____, 103 S. Ct. 2317 (1983). There, the decision

reaffirmed the "central teaching" of the Court's earlier decisions that probable cause is a "practical, nontechnical conception." "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." ____ U.S. at ____, 103 S. Ct. at 2328, *quoting Brinegar* v. *United States*, *supra*, 338 U.S. at 175, 176.

The Court in *Gates* "reaffirm[ed] the totality of the circumstances analysis that traditionally has informed probable cause determinations." ____ U.S. at ____, 103 S. Ct. at 2332. Under this test, it is the task of a magistrate considering an application for a search warrant

> "to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.*

"[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Id.* at 2335 n.13.

The "probable cause" standard leaves room for reasonable police errors of fact and of law. In *Brinegar*, the Court made this important observation:

> "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, *room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability*. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for

> accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." 338 U.S. at 176. (Emphasis supplied.)

The Fourth Amendment's tolerance of reasonable police mistakes is reflected in the rulings of this Court. In *Hill* v. *California*, 401 U.S. 797 (1971), the Court upheld a warrantless arrest and subsequent search incident to the arrest where the police had probable cause to arrest an individual named Hill but through a mistake in identity arrested another person in Hill's apartment. The Court found the officers' actions consistent with the Fourth Amendment. The officers' mistake in arresting the wrong person did not negate the fact that probable cause existed for the arrest.

The Court's decision in *Michigan* v. *DeFillippo*, 443 U.S. 31 (1979), also reflects the flexibility embodied in the probable cause standard. There, the police arrested the respondent for a violation of a Michigan statute which was later held unconstitutional. Noting that probable cause was present at the time of the arrest, the Court upheld the arrest as reasonable under the Fourth Amendment. The Court rejected the claim that the police should have anticipated that the statute would be found unconstitutional.

The Court's decision in *Franks* v. *Delaware*, 438 U.S. 154 (1978), is also illustrative. In *Franks*, the Court held that a search warrant cannot be attacked on the basis of erroneous "facts" provided by an informant to a police officer, so long as the officer reasonably credits those facts.

The foregoing discussion is intended to highlight the flexibility embodied in the Fourth Amendment. As this

Court's decisions demonstrate, the probable cause standard was carefully chosen by our Founding Fathers as the appropriate balance of the citizens' rights in personal privacy, on the one hand, and in effective law enforcement, on the other.

B. The Proposed Modification Of The Exclusionary Rule Will Encourage Violations Of The Fourth Amendment

1. The Exclusionary Rule Preserves The Fourth Amendment Freedoms Of All Citizens

The exclusionary rule adopted in federal prosecutions in *Weeks* v. *United States*, 232 U.S. 383 (1914), and extended to state prosecutions in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), was "adopted to effectuate the Fourth Amendment right of all citizens 'to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . .' Under this rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure." *United States* v. *Calandra*, 414 U.S. 338, 347 (1974). The exclusionary rule comes into play, of course, only when police conduct is "unreasonable" within the meaning of the Fourth Amendment. The exclusionary rule is applicable, therefore, only where the Framers of the Constitution forbade the police to secure evidence in the manner in which it was obtained.

The exclusionary rule protects all citizens by "compel-[ling] respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U.S. 206, 217 (1960). The rule removes this incentive by attempting to ensure that law enforcement officials will not be able to use evidence of crime obtained through violations of Fourth Amendment standards. The rule is intended,

moreover, to deter all law enforcement officials from committing such violations. As stated by Justice Stevens, concurring in *Dunaway* v. *New York*, *supra*, 442 U.S. at 221: "The justification for the exclusion of evidence obtained by improper methods is to motivate the law enforcement profession as a whole—not the aberrant individual officer—to adopt and enforce regular procedures that will avoid the future invasion of the citizen's constitutional rights."

The exclusionary rule continues to be the only available means of securing Fourth Amendment protections.[4] As retired Justice Stewart has recently written, for "the vast majority of fourth amendment violations," "a remedy is required that inspires the police officer to channel his enthusiasm to apprehend a criminal toward the need to comply with the dictates of the fourth amendment. There is only one such remedy—the exclusion of illegally obtained evidence." Stewart, *The Road to Mapp* v. *Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1389 (1983) [hereinafter cited as "Stewart"]. Justice Jackson succinctly explained in *Brinegar* how the exclusionary rule works to protect Fourth Amendment rights:

> "If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be,

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[4] Petitioners have not seriously argued that alternative means have been developed to protect Fourth Amendment rights. The United States suggests that the absence of effective alternatives is "simply not a controlling consideration." Brief for the United States, at 88.

> and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.
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> *Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty.*" 338 U.S. at 181 (dissenting opinion). (Emphasis supplied.)

In the absence of the exclusionary rule, the disincentive associated with unconstitutional behavior would disappear. The result would be a significant reduction in Fourth Amendment protection.[5]

2. The proposed modification would encourage police officers to conduct arrests and searches on less than probable cause

The modification of the exclusionary rule now proposed would give official encouragement to arrests and searches on less than probable cause.

As described by the United States, the modification would apply (i) to warrantless arrests and searches by police officers who believe that a crime is being committed in their presence (Brief for the United States, at 47-57) and (ii) to searches made pursuant to a judicially

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[5] The New York Deputy Police Commissioner stated after the decision in *Mapp* v. *Ohio*, 367 U.S 643 (1961):

> "The *Mapp* case was a shock to us. We had to reorganize our thinking, frankly. Before this, nobody bothered to take out search warrants. Although the Constitution requires warrants in most cases, the Supreme Court had ruled [until 1961] that evidence obtained without a warrant—illegally, if you will—was admissible in state courts. So the feeling was, why bother?" *The New York Times*, April 28, 1965, p. 50.

authorized warrant (Brief for the United States, at 57-68).

In the first of these situations, the United States urges that police officers must be free to respond to on-the-scene situations that develop in their presence without fear that their actions will be condemned by the courts long after the event. The Fourth Amendment, however, provides police officers with ample leeway to act in such situations. It is well established that "the Constitution permits an officer to arrest a suspect without a warrant if there is probable cause to believe that the suspect has committed or is committing an offense." *Michigan* v. *DeFillippo*, *supra*, 443 U.S. at 36.

Petitioners contend that in cases near the dividing line between probable cause and mere suspicion the exclusionary rule should be inapplicable even if it turns out that the officer proceeded without probable cause. According to Petitioners, an officer proceeding without probable cause in a close case has made a "reasonable mistake" about the requirements of the Fourth Amendment, and no useful deterrent purpose would be served by applying the exclusionary rule in such instances. *See*, *e.g.*, Brief for the United States, at 30-31, 47-57.

Petitioners' position that arrests and searches made on the basis of suspicion should not lead to application of the exclusionary rule must be rejected for two reasons. First, if police action is taken without probable cause, then it cannot be based on a "reasonable" mistake within the contemplation of the Fourth Amendment. As noted, the probable cause standard affords ample leeway for reasonable police judgment, including reasonable errors. As the Court observed in *Brinegar*, however, "the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability" of criminal

activity. 338 U.S. at 176. A police officer who has proceeded without probable cause has necessarily made an "unreasonable" error in the eyes of the Fourth Amendment.[6] The "reasonable mistake" modification, therefore, is a contradiction in terms and at odds with the Fourth Amendment.

Second, the proposed modification would effectively destroy the probable cause standard and make probable cause a mere exhortation without practical significance. Arrests and searches made on suspicion would carry with them potential benefits for police officers in the form of admissible evidence, while threatening none of the adverse consequences that must accompany unconstitutional behavior. Officers would quickly learn that as long as they could point to some basis for their suspicion, an arrest or search could be undertaken without probable cause. If the police action produced evidence, the evidence would be admissible. If no evidence were secured, the officer would have lost nothing for the effort. The result in either event would be the encouragement of police action forbidden by the Fourth Amendment.

A corresponding impairment of Fourth Amendment protection will result if, as the United States urges, evidence seized pursuant to an invalid warrant is rendered admissible in criminal proceedings. The position of the United States on this point, in effect, is that, except in some undefined category of rare cases, a magistrate's assessment of probable cause should be conclusive.[7]

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[6] *See, e.g., Ybarra* v. *Illinois*, 444 U.S. 85 (1979); *Torres* v. *Puerto Rico*, 442 U.S. 465 (1979); *Dunaway* v. *New York*, 442 U.S. 200 (1979); *Whiteley* v. *Warden*, 401 U.S. 560 (1971).

[7] The United States states that suppression of evidence secured pursuant to a warrant "*may* be justified if the factors relied on by the magistrate 'were so lacking in indicia of probable cause as to render

Elimination of the exclusionary rule where a warrant has been issued will permit an illegal warrant to shield an illegal search or seizure. Since a warrant based on suspicion will assure admissibility, probable cause will no longer be the operative standard for a police officer deciding whether he has sufficient information to present to a magistrate. The officer will have every incentive to proceed on suspicion, on the chance that the magistrate will issue the warrant, and no incentive to engage in further investigation so as to satisfy the Fourth Amendment's requirement of probable cause.

The United States will no doubt respond that magistrates are available to prevent the indiscriminate use of unlawful warrants. Magistrates need not be lawyers, however, and they "certainly do not remain abreast of each judicial refinement of the nature of 'probable cause.' " *Illinois* v. *Gates*, *supra*, ____ U.S. ____, 103 S. Ct. at 2330. Without intending any disrespect for persons serving as magistrates, *Amici* submit that these individuals simply cannot be entrusted with the ultimate preservation of our Fourth Amendment freedoms, without the modulating effects of judicial review available for all other infringements of constitutional rights. We agree with retired Justice Stewart that "if the fourth amendment's probable cause requirement is to be enforced, reviewing courts must have the authority on occasion to inform magistrates in a meaningful way that warrants

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official belief in its existence entirely unreasonable.' " Brief for the United States, at 65 (emphasis supplied). This suggests that the United States would permit continued application of the exclusionary rule in those few cases in which there is no information to support the issuance of the warrant. This concession cannot justify the dilution of probable cause that will inevitably result if the modification is adopted.

based on something less than probable cause are not to be tolerated." Stewart, *supra*, 83 Colum. L. Rev. at 1403.

This Court has never accorded conclusive effect to magistrates' determinations of probable cause. *Franks* v. *Delaware*, 438 U.S. 154 (1978); *Nathanson* v. *United States*, 290 U.S. 41 (1933). In *Gates*, the Court reaffirmed that although the scope of review is limited, "courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued." ___ U.S. at ___, 103 S. Ct. at 2332. The Court reiterated that "the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." ___ U.S. at ___, *id.* at 2332, *quoting Jones* v. *United States*, 362 U.S. 257, 271 (1960).

Petitioners' proposed modification of the exclusionary rule is thus in reality an attack on the constitutional requirement of probable cause. The modification rests on the view that it is simply not important—where the issue is close—whether arrests and searches are made on the basis of probable cause or on the basis of suspicion. Indeed, the United States openly admits this. According to the United States, resolution of the "fact-specific questions" of probable cause in such cases as *Leon* and *Quintero* does

> "little to advance understanding of Fourth Amendment principles of general importance. In such instances, it will generally be far easier to determine the applicability of the reasonable mistake exception than to grapple with the nettlesome but *relatively inconsequential* underlying substantive question." Brief for the United States, at 83. (Emphasis added.)

The need for probable cause for police action is anything but "inconsequential"; it is the heart of the Fourth Amendment. Petitioners apparently fail to recognize that

this Court is not free to revise the Constitution or to reevaluate the Framers' basic judgment, reached after careful balancing of the interests at stake, that law enforcement officials should be forbidden from proceeding with searches and seizures except upon probable cause and should not have the use of evidence secured through police action based only on suspicion.

Petitioners repeatedly assert that the exclusionary rule imposes significant "costs" on the criminal justice system. The balance of costs and benefits, however, has already been struck by the Framers. The exclusionary rule does no more than effectuate the Fourth Amendment, and the rule, therefore, imposes no "costs" beyond those that are intended to be imposed by obedience to the Constitution.[8] *Amici* submit that the "costs" of complying with the Fourth Amendment cannot justify the virtual abandonment of the standard of probable cause. If the probable cause standard is to be abandoned, the constitutionally designated processes for amendment must be observed.

The proposed modification would make probable cause a relic of a bygone era. *Amici* submit that the issue of probable cause should not be relegated to some sort of

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[8] Retired Justice Stewart has observed that:

> "Much of the criticism leveled at the exclusionary rule is misdirected; it is more properly directed at the fourth amendment itself. It is true that, as many observers have charged, the effect of the rule is to deprive the courts of extremely relevant, often direct evidence of the guilt of the defendant. But these same critics sometimes fail to acknowledge that, in many instances, the same extremely relevant evidence would not have been obtained had the police officer complied with the commands of the fourth amendment in the first place."

Stewart, supra, 83 Colum. L. Rev. at 1392. See also *Mincey* v. *Arizona*, 437 U.S. 385, 393 (1978).

constitutional oblivion. The courts must continue to decide the issue of probable cause and must exclude evidence secured where this fundamental requirement is not met. The Fourth Amendment's protection against arbitrary invasions of privacy will inevitably wilt and disappear if it is not given content and enforced by the courts.[9]

C. No Decision Of This Court Provides A Basis For The Proposed Modification Of The Exclusionary Rule, And The Decision In *United States* v. *Johnson*, 457 U.S. 537 (1982), Mandates Its Rejection

Petitioners point to a number of this Court's decisions as purportedly supporting the proposed modification of the exclusionary rule. As we shall demonstrate, however, the Court's decisions do not provide a basis for the modification, but rather underscore the need for the retention of the exclusionary rule in criminal trials. The Court's recent pronouncement in *United States* v. *Johnson*, 457 U.S. 537 (1982), in particular mandates rejection of the modification.

The Court's decisions in such cases as *United States* v. *Calandra*, 414 U.S. 338 (1974) (grand jury questions based upon illegally obtained evidence); *United States* v.

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[9] Probable cause issues such as those presented in *Quintero* and *Leon* arise frequently. If such cases are decided in the future under a "reasonable mistake" rule rather than under the Fourth Amendment standard of probable cause, probable cause will quickly lose its place as a requirement of constitutional importance. Prosecutors will regularly proceed, as the United States and Colorado have in this Court, by seeking to avoid decision of the issue of probable cause. *See* Petition for Certiorari in *United States* v. *Leon*, at 9 n.10; Brief for Petitioner in *Colorado* v. *Quintero*, at 10-11. The Court, of course, is free to decide the probable cause issues in these cases notwithstanding Petitioners' submissions.

Janis, 428 U.S. 433 (1976) (use of evidence illegally obtained by State officer in federal civil proceeding); *Stone* v. *Powell*, 428 U.S. 465 (1976) (consideration by federal habeas corpus court of Fourth Amendment claim already heard by a state tribunal); and *United States* v. *Havens*, 446 U.S. 620 (1980) (use of illegally obtained evidence for impeachment at trial), all explicitly rest on the rationale that the deterrence achieved by the exclusionary rule would be enhanced only minimally, if at all, if the exclusionary rule were extended beyond its core application during the government's case-in-chief. As observed by the United States, "it appeared unlikely to the Court" in each of those cases "that police officers would be encouraged to engage in prohibited conduct by the availability of the particular uses of unlawfully seized evidence there permitted." Brief for the United States, at 42.

In the present situation, by contrast, it is clear for the reasons previously discussed that the proposed modification will operate to encourage the police to engage in unconstitutional conduct. The Court's decisions refusing to extend the rule beyond the government's case-in-chief, therefore, provide no basis for the current effort to sap the rule's vitality in the case-in-chief itself. Indeed, the Court's reliance on the efficacy of the exclusionary rule at trial as a basis for the Court's refusal to exclude illegally obtained evidence in other proceedings only serves to underscore the need for retention of the exclusionary rule in its core application.

Nor do the Court's decisions in *Michigan* v. *DeFillippo*, 443 U.S. 31 (1979), and *Hill* v. *California*, 401 U.S. 797 (1971), provide any basis for modifying the exclusionary rule. *See* Brief for the United States, at 53-55. In both cases, probable cause existed for the arrests, and the Court held only that the subsequent invalidation of

the criminal statute in *DeFillippo* and the error by the police concerning the identity of the arrestee in *Hill* did not detract from the lawfulness of the arrests under the Fourth Amendment. Both cases dealt with *constitutional* police action and do not suggest that *unconstitutional* police actions should be placed beyond the reach of the exclusionary rule.[10]

Nor is the Petitioners' heavy reliance on the Court's decision in *United States* v. *Peltier*, 422 U.S. 531 (1975), warranted. *See* Brief for the United States, at 34, 37, 43. *Peltier* was a retroactivity case that addressed the applicability of the rule announced in *Almeida-Sanchez* v.

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[10] The Court's decisions in *Alderman* v. *United States*, 394 U.S. 165 (1969), *Michigan* v. *Tucker*, 417 U.S. 433 (1974), *Brown* v. *Illinois*, 422 U.S. 590 (1975), and *United States* v. *Caceres*, 440 U.S. 741 (1979), likewise do not support the drastic curtailment of the exclusionary rule proposed by Petitioners.

In *Alderman*, the Court reaffirmed the exclusionary rule, 394 U.S. at 174-75, and simply refused to enlarge its scope by permitting its invocation by persons whose constitutional rights had not been violated. In *Brown*, the issue was whether a confession was the product of an unconstitutional arrest. Both the majority opinion, which reversed the conviction, and the concurring opinion, which proposed remand for a "taint" hearing, recognized that a confession tainted by a Fourth Amendment violation is inadmissible in a criminal trial.

Tucker did not involve a Fourth Amendment issue but rather a pre-*Miranda* violation of the *Miranda* rule. There, the Court noted that the defendant's incriminating statement had been excluded at trial. The Court held only that the testimony of a prosecution witness mentioned in defendant's statement would not also be suppressed. *Caceres* likewise presented no Fourth Amendment question. The case involved only a violation of agency regulations which did not infringe on any Fourth Amendment or other constitutional right of the defendant. Fourth Amendment exclusionary rule precedents were simply inapplicable. 440 U.S. at 754-55.

United States, 413 U.S. 266 (1973), to border searches conducted prior to the date of that decision. The Court found that the Border Patrol's pre-*Almeida-Sanchez* practices were "in reliance upon a validly enacted statute, supported by longstanding administrative regulations and continuous judicial approval" and therefore "conform[ed] . . . to the prevailing statutory [and] . . . constitutional norm." 422 U.S. at 541, 542. The Court reasoned that in light of the prior law supporting the pre-*Almeida-Sanchez* practices, there was no basis upon which it could "be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." 422 U.S. at 542. The Court accordingly declined to apply the exclusionary rule to the Border Patrol's pre-*Almeida-Sanchez* conduct.

The Court's subsequent decision in *United States* v. *Johnson*, 457 U.S. 537 (1982), demonstrates the limited reach of the Court's holding in *Peltier*. In *Johnson*, the Court considered the applicability of the rule announced in *Payton* v. *New York*, 445 U.S. 573 (1980), to arrests made prior to the date of that decision. In *Payton*, the Court, resolving a previously unsettled question, held that an arrest warrant is necessary when police officers make a routine felony arrest of a person in his own home. The United States urged in *Johnson* that the Court's decision in *Peltier* was controlling and that police officers proceeding prior to *Payton* could not be faulted for failing to obtain an arrest warrant. The United States urged that the deterrent purposes of the exclusionary rule would not be served by application of the rule to pre-*Payton* arrests.

The Court in *Johnson* rejected the United States' reliance on *Peltier*. The Court noted that the rule an-

nounced in *Almeida-Sanchez*, which was at issue in *Peltier*, "represented a 'clear break' with the past" and "[f]or that reason alone, under controlling retroactivity precedents, the nonretroactive application of *Almeida-Sanchez* would have been appropriate even if the case had involved no Fourth Amendment question." *United States* v. *Johnson*, *supra*, 457 U.S. at 558. The Court then concluded that the situation in *Johnson*—where the necessity for an arrest warrant was "unsettled"—was readily distinguishable for exclusionary rule purposes from the situation in *Peltier*—where the Border Patrol's actions clearly conformed in all respects with the law as it stood prior to *Almeida-Sanchez*. 457 U.S. at 558, 560-61.

In *Johnson*, the Court rejected the United States' contention that if the lawfulness of police conduct is debatable, the police should be entitled to proceed and the exclusionary rule should be inapplicable to any evidence secured. The Court found that this approach would jeopardize Fourth Amendment freedoms:

> "If, as the Government argues, all rulings resolving unsettled Fourth Amendment questions should be nonretroactive, then, in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior. Official awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice would be excluded only in the one case definitively resolving the unsettled question." *United States* v. *Johnson*, *supra*, 457 U.S. at 561.

In *Johnson*, the Court concluded that the exclusionary rule must be applied in close cases to induce police officers to act within the bounds of the Fourth Amendment. This should be the Court's ruling here as well. Law enforce-

ment officials cannot be provided with "official certainty" that evidence obtained through a search or seizure without probable cause will be admissible at a criminal trial. *United States* v. *Johnson*, *supra*, 457 U.S. at 561. As retired Justice Stewart has concluded, if the policies of the exclusionary rule, as held in *Johnson*, are "served by requiring exclusion when police officers make a mistake while acting in a constitutional 'gray area,' it is clear that the same policies are served when officers act unconstitutionally by engaging in conduct that is prohibited under settled fourth amendment precedent." Stewart, *supra*, 83 Colum. L. Rev. at 1402-03.

CONCLUSION

Petitioners suggest that the proposed modification should be adopted in the interests of effective law enforcement. Contrary to Petitioners' suggestion, however, the issue is not whether effective law enforcement is a desirable goal. As we have noted, the Fourth Amendment provides ample room for effective law enforcement. The issue here is whether the particular balance between personal privacy and law enforcement embodied in the Fourth Amendment will be preserved and enforced. In our society, the ends do not justify the means, and *Amici* submit that the ends of law enforcement cannot justify the sacrifice of the requirement of probable cause. We cannot improve on this Court's declaration nearly seventy years ago in *Weeks:*

> "The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." 232 U.S. at 393.

We submit that the issues surrounding the proposed "reasonable mistake" or "good faith" modification of the exclusionary rule have now been fully and exhaustively examined and that the proposed weakening of the exclusionary rule is simply inconsistent with the preservation of Fourth Amendment rights. The proposed modification of the exclusionary rule should be firmly and finally rejected by this Court.

Respectfully submitted,

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COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

vs.

OSBORNE SHEPPARD,

Respondent.

No. 82-1711

STATE OF COLORADO,

Petitioner,

vs.

FIDEL QUINTERO,

Respondent.

No. 82-1771

UNITED STATES OF AMERICA,

Petitioner,

vs.

ALBERTO ANTONIO LEON,

Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, THE SUPREME COURT OF COLORADO, AND THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Whether this Court should adopt an exception to the Fourth Amendment Exclusionary Rule that will permit the admissibility of evidence that would otherwise be suppressed, where law enforcement officers act in an objective good faith belief that their conduct is proper.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-963

COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

vs.

OSBORNE SHEPPARD,

Respondent.

No. 82-1711

STATE OF COLORADO,

Petitioner,

vs.

FIDEL QUINTERO,

Respondent.

No. 82-1771

UNITED STATES OF AMERICA,

Petitioner,

vs.

ALBERTO ANTONIO LEON,

Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, THE SUPREME COURT OF COLORADO, AND THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Counsel for the various parties, and letters of consent of the parties have been filed with the Clerk of this Court.

INTEREST OF AMICUS

The NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., is a non-profit corporation and the sole national organization representing state and local prosecuting attorneys in America. Its programs of education, training, publications and *amicus curiae* activity carry out its guiding purpose since its founding in 1950 of reforming the criminal justice system for the benefit of all our citizens.

The prosecutors of this nation are fully conversant with the problems faced by state and federal law enforcement officers in their good faith attempts to conduct criminal investigations and gather evidence by using investigative procedures that comply with the myriad of rules and exceptions that have been judicially engrafted upon the Fourth Amendment. It was noted by David L. Armstrong, Commonwealth Attorney, Louisville, Kentucky, former President of NDAA, in his testimony before the Subcommittee on Criminal Law, Committee on the Judiciary, United States Senate, on April 20, 1982, on the federal Exclusionary Rule reform bills (S. 101, S. 751), that it is the *prosecutor* upon whom the heaviest burden of the Rule rests. The prosecutor must not only act as a guide for the police in tracing their way through this maze of rules, but must shoulder the responsibility for unsuccessful prosecution when a trial or appellate court suppresses vital and reliable evidence. Since the Rule also exacts a heavy price from Society by freeing guilty persons, continuation of the Rule in its absolute form can no longer be justified. As noted by Edwin L. Miller, Jr., District Attorney, San Diego, California, President of NDAA, in his testimony on May 11, 1983, before the Subcommittee on Criminal Law, Committee on the Judiciary, United States Senate, on behalf of NDAA and in favor of the Exclusionary Rule reform provisions of then-pending S. 829:

> One of the more pernicious aspects of the Exclusionary Rule in its present form, is that it protects *only* the criminal and does nothing for the innocent citizen who is wrongly

> stopped or searched by police. It is an ignoble judicial rule which gives 100% of its benefits--in every case at every time, with no exceptions—to criminals, at the expense of honest citizens.

Amicus argued for adoption of the good faith exception to the Exclusionary Rule in the case of *Illinois v. Gates*, ____ U. S. ____, 103 S. Ct. 2266 (1983) in the last Term of this Honorable Court. We understand the reasons why the Court chose not to reach the issue in that case. We believe that the issue is squarely and appropriately presented in all three of the cases now before this Court, and we respectfully resubmit the arguments that we asked the Court to consider in *Gates*.

STATEMENT

In its opinion in *Commonwealth* v. *Sheppard*, 441 N. E. 2d 725 (Mass. 1982), the court held that evidence seized under a warrant that, because of the good faith negligence of the issuing magistrate, failed to describe the items to be seized, had to be suppressed under the Fourth Amendment Exclusionary Rule. In doing so, the court based its decision squarely on the Fourth Amendment, noting, "... we need not consider whether the evidence should be suppressed pursuant to the laws of this Commonwealth. To this date this court has not adopted an exclusionary rule under the law of the Commonwealth to remedy a violation of a criminal defendant's art. 14 [of the Massachusetts Declaration of Rights] rights." 441 N. E. 2d at 736. Article 14 is the Commonwealth's equivalent of the Fourth Amendment.

In *Colorado* v. *Quintero*, 657 P. 2d 948 (Colo. 1983), the court held that the fact that the respondent was a stranger to a neighborhood, acted suspiciously, and was in possession of a television set that he tried to cover with his shirt, was insufficient to establish probable cause for his arrest in a situation where the police lacked evidence that a crime had been committed. The court declined to apply a Colorado statute adopted in 1981 (C.R.S. 1973, 16-3-308) which renders evidence admissible when seized as a result of a "good faith mistake", taking the position that the statute contemplated a misperception of an existing fact, whereas the case actually involved a mistaken judgment of law, and that the good faith exception had not been adopted by the U. S. Supreme Court. 657 P. 2d at 950-51.

Finally, in *United States* v. *Leon*, 701 F. 2d 187 (9th Cir. 1983), the court held that a federal trial judge properly suppressed evidence seized pursuant to a search warrant, issued by a state magistrate, on the ground that the affidavit in support of the warrant was inadequate. Although invited by the Government to recognize a good faith exception to the Ex-

clusionary Rule, the court stated, "[w]e have not heretofore recognized such an exception and we decline the invitation to recognize one at this juncture." Petition for Writ of Certiorari, *U. S.* v. *Leon*, 82-1771, Appendix A, p. 4. Nevertheless, the federal trial judge found that the law enforcement officers acted in good faith, and this finding was not disturbed by the Ninth Circuit Court of Appeals.

Thus, *amicus* submits that the issue of a good faith exception to the Exclusionary Rule is appropriately before this Court in these three cases—in warrantless as well as warrant settings, and that the Court can and should now address the question framed originally in its order of November 29, 1982, in *Illinois* v. *Gates*, *supra*, "... whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Weeks* v. *United States*, 232 U. S. 383 (1914), should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment."

SUMMARY OF ARGUMENT

Applying the Fourth Amendment Exclusionary Rule in cases where law enforcement officers have acted in objective good faith no longer serves the purposes for which the Rule was originally intended. We ask this Court to adopt a good faith exception to the Rule not only in cases where a search warrant has been issued by an impartial magistrate, as in *Commonwealth* v. *Sheppard*, *supra*, and *U. S.* v. *Leon*, *supra*, but also in *all* appropriate cases where the police have acted in the objective good faith belief that their conduct conformed to the requirements of the Fourth Amendment, as in the warrantless case of *Colorado* v. *Quintero*, *supra*.

ARGUMENT

IF THIS COURT FINDS THAT THE EVIDENCE IN ANY OF THESE CASES WAS OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT, IT SHOULD ADOPT AND APPLY AN EXCEPTION TO THE FOURTH AMENDMENT EXCLUSIONARY RULE THAT WOULD PERMIT THE ADMISSIBILITY OF EVIDENCE WHERE LAW ENFORCEMENT OFFICERS HAVE ACTED IN AN OBJECTIVE GOOD FAITH BELIEF THAT THEIR CONDUCT WAS PROPER.

There is probably no better description of the Exclusionary Rule's basic defect, and the appropriate remedy for such defect, than the recommendation of the Attorney General's Task Force on Violent Crime in its Final Report of August 17, 1981:

> The fundamental and legitimate purpose of the exclusionary rule—to deter illegal police conduct and promote respect for the rule of law by preventing illegally obtained evidence from being used in a criminal trial—has been eroded by the action of the courts barring evidence of the truth, however important, if there is any investigative error, however unintended or trivial. We believe that any remedy for the violation of a constitutional right should be proportional to the magnitude of the violation. In general, evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the **reasonable, good faith belief** that it was in conformity to the Fourth Amendment to the Constitution. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a good faith belief.

Attorney General's Task Force on Violent Crime, 29 CrL 3131, 3134 (1981) (emphasis supplied).

Although *amicus* previously recommended outright abolition of the Rule, see National Prosecution Standards, Standard 19.11, and Commentary, *Exclusionary Rule*, p. 356, National District Attorneys Association (1977), we adopted the Attorney General's Task Force recommendations at our Board of Direc-

tors meeting on October 8, 1981, as a reasonable alternative that will effectively address the proper concerns of all participants in the criminal justice system. We do not believe, however, that this Court should limit the application of such an exception to warrant cases only, and we have supported legislation that would provide for a general good faith exception. Statement of David L. Armstrong, former President, NDAA, before Subcommittee on Criminal Law, Committee on the Judiciary, United States Senate, on April 20, 1982; Statement of Edwin L. Miller, Jr., President, NDAA, before Subcommittee on Criminal Law, Committee on the Judiciary, United States Senate, on May 11, 1983. See also, Miller, *The Exclusionary Rule and Its Alternatives*, 12 The Prosecutor 335 (1977); Van de Kamp, *The Exclusionary Rule: Promises Not Kept—Proposed Alternatives*, 15 The Prosecutor 348 (1981).

In this regard we believe that the Colorado good faith exception statute, C.R.S. 1973, 16-3-308 (1981), written by former Denver District Attorney Dale Tooley, and the similar Arizona state, A.R.S., 13-3925 (1982), serve as examples for the states because they test good faith by an objective standard, rather than simply by the subjective beliefs of a police officer that his conduct conforms to the Fourth Amendment. We note also the recent promulgation of a Model State Statute on Exclusionary Rule Limitations by Americans for Effective Law Enforcement, Inc. The Model Statute uses an objective standard, and we anticipate that it will be used by many states in drafting their statutes in this area.

Although statutory reform at the state and federal levels is highly desireable, caselaw development has been the primary vehicle for reform of the Exclusionary Rule, and we support this development. The seminal case in the adoption of the good faith exception by the courts is *United States* v. *Williams*, 622 F. 2d 830 (5th Cir.), *cert. den.*, 101 S. Ct. 946 (1981), where the Fifth Circuit Court of Appeals, sitting *en banc*, stated:

> Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery,

> it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the court so finds, it shall not apply the Exclusionary Rule to the evidence.

622 F. 2d 830, 846-7.

In adopting this approach, the *Williams* Court noted that an officer's subjective belief concerning the legality of a search would not suffice. Ignorance of the basic principles of criminal procedure would not constitute good faith. The police officer's actions are subject to an objective test and must be "based upon articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe he was acting lawfully." 622 F. 2d at 847.

The *Williams* Court, we believe, put to rest the argument of the respondents that the Exclusionary Rule is needed to deter police misconduct: "It makes no sense to speak of deterring police officers who acted in the good-faith belief that their conduct was legal by suppressing evidence derived from such actions unless we somehow wish to deter them from acting at all." 622 F. 2d at 842. The court stated that the Rule should apply only when that application can serve its originally intended purpose, i.e., deterrence. 622 F. 2d at 847.

The growing dissatisfaction with the absolute application of the Exclusionary Rule has prompted several other courts to recognize a good faith exception to the Rule. *See e.g., United States* v. *Ajlouny*, 629 F. 2d 830, 840-42 (2d Cir. 1980), *cert. den.*, 449 U. S. 1111 (1981) (good-faith mistake of law); *State* v. *Lehnen*, 403 So. 2d 683 (La. 1981) (mistake of fact); *Nix* v. *State*, 621 P. 2d 1347, 1349-50 (Alas. 1981) (consent to search; good-faith mistake of fact); *Richmond* v. *Commonwealth*,[1] 28

[1] The Supreme Court of Kentucky affirmed on other grounds at 29 K. L. S. 10 (Ky. 1982), taking the position that magistrates have statewide jurisdiction to issue search warrants under the Kentucky Constitution.

K. L. S. 10, 29 Cr L 2529 (Ky. App. 1981), *aff'd.*, 29 K. L. S. 10 (Ky. 1982) (mistake of law); *People* v. *Adams*, 53 N. Y. 2d 1, 442 N. E. 2d 537 (1981) (exigency; mistake of fact); *Commonwealth* v. *Bradshaw*, 434 A. 2d 181, 183 (Pa. 1981) (good-faith but mistaken belief in informant's information). In each of these cases, the courts have recognized that the original deterrance rationale for the rule—if it *ever* was valid—has been eroded to the point of non-existence, and these courts have wisely applied the principle that "[w]here the reason for the rule ceases, its application must cease also." *United States* v. *Williams*, 622 F. 2d at 840; *see*, Attorney General's Task Force on Violent Crime, *supra*, at 3134 (1981).

Whatever deterrence the Rule has achieved has, moreover, been obtained at high cost. As a study of the National Institute of Justice released on December 17, 1982, noted, one out of every three persons arrested in Los Angeles, California, on felony drug charges, was not brought to trial because the police committed errors in seizing evidence, and that approximately half of the defendants released in that State because of the Exclusionary Rule were arrested within two years for new offenses. Bosarge, *NIJ Study Finds Exclusionary Rule Has Major Negative Impact on Prosecuting Drug Cases*, 16 Crime Control Digest, No. 52, p. 1 (1982). *Amicus* submits that the statistics cited in the NIJ report amply justify concern with an application of the Rule that fails to recognize an exception for police officers acting in objective good faith. The main effect of the Rule seems not to have been the deterrence of police misconduct, but, rather, the deterrence of convictions of those who continue to prey upon our law-abiding citizens.

Perhaps no better statement of the pervasive discontent with the Rule because of its inherent inadequacy and ineffectiveness—as well as its intolerable excesses—exists than the statement by former Los Angeles, California, District Attorney, John K. Van de Kamp, now California Attorney General:

A review of the rule's application and development leads to the following conclusions:

• It has failed to live up to the expectations of those who framed it.

• Despite the dramatic improvement in police professionalism, the rule itself is of questionable effectiveness in deterring instances of improper police conduct.

• The statutory rules and case law governing search and seizure have become so complex and change so frequently that no law enforcement officer can be reasonably expected to know them in their entirety. This is also true of the rules governing arrest, confessions, line-ups and other areas of police procedure where the exclusionary rule comes into play.

• As a consequence of its implementation, truthful, reliable and probative evidence is kept from the trier of fact in criminal cases. As a result, guilty persons sometimes go free. On occasion, cases are so weakened by the loss of the excluded evidence that a conviction—if it can be obtained at all—can only be obtained on charges less substantial than those for which a defendant is guilty in fact.

Van de Kamp, *The Exclusionary Rule: Promises Not Kept—Proposed Alternatives*, 15 The Prosecutor 348 (1981).

We also join with Justice White in his concurring opinion in *Illinois v. Gates, supra*, in noting the futility of further pursurance of a mechanical application of the Rule: such a pursuit does not take into account the realities of present day law enforcement and the societal costs of applying the Rule. ___U. S. ___, ___, 103 S. Ct. 2317, 2342-2344.

Amicus believes that to apply the Exclusionary Rule in cases such as the instant cases, where law enforcement officers have acted in objective good faith, serves no good purpose whatsoever. It is, indeed, time for a change, as the many *amici* supporting the petitioners in these cases have urged. Although prosecutors have been in the vanguard of state and federal

legislative and judicial reform of the Rule, we must look to the United States Supreme Court for a final answer to this issue. The prosecutors of this nation know that this Honorable Court will give this matter—which is probably the most important criminal justice issue of the 20th Century—careful and balanced consideration.

CONCLUSION

Amicus respectfully submits that the Exclusionary Rule should not be applied in these cases. They present a timely and appropriate opportunity for the Court to adopt an objective good faith exception to the Exclusionary Rule. We ask that the decisions of the Supreme Judicial Court of Massachusetts, the Supreme Court of Colorado, and the Ninth Circuit Court of Appeals, be reversed on the facts and law, and on the basis of sound judicial policy.

Respectfully submitted.

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UNITED STATES OF AMERICA, *Petitioner*,
v.
ALBERTO ANTONIO LEON, ET AL., *Respondents*.

On Writ of Certiorari to the Supreme Court of Massachusetts, The Supreme Court of Colorado, and the United States Court of Appeals for the Ninth Circuit, Respectively

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BRIEF OF AMICI CURIAE, SEVEN FORMER MEMBERS OF THE ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, THE LEGAL FOUNDATION OF AMERICA, AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., ET AL.*, IN SUPPORT OF PETITIONERS

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NO. 82-963
NO. 82-1711
NO. 82-1771

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

COMMONWEALTH OF MASSACHUSETTS, *Petitioner*,
v.
OSBORNE SHEPPARD, *Respondent*.

STATE OF COLORADO, *Petitioner*,
v.
FIDEL QUINTERO, *Respondent*.

UNITED STATES OF AMERICA, *Petitioner*,
v.
ALBERTO ANTONIO LEON, ET AL., *Respondents*.

BRIEF OF AMICI CURIAE, SEVEN FORMER MEMBERS OF THE ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, THE LEGAL FOUNDATION OF AMERICA, AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., ET AL.*, IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

Because of their number,* amici will be described in groups.

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* A similar group of amici appeared last term in Illinois v. Gates, 51 U. S. L. W. 4709 (U. S. S. Ct. June 8, 1983). At that time, the Clerk's office advised that as many amici as possible be consolidated in a single brief to minimize imposition upon the Court. Amici herein have attempted to comply with that advice, and hence this brief reflects the joinder of several different categories of amici.

I. *Seven Former Members of the Task Force on Violent Crime of the Attorney General of the United States.* On April 10, 1981, the Attorney General of the United States convened a Task Force on Violent Crime. The objective of the Task Force was to make specific recommendations to the Attorney General concerning ways in which the federal government could combat violent crime.

Members of the Task Force were:

> Honorable Griffin B. Bell, Esq., Former Attorney General of the United States; Former Judge, U. S. Court of Appeals for the Fifth Circuit, Co-Chairman.
>
> Honorable James R. Thompson, Esq., Governor of Illinois, Co-Chairman.
>
> Honorable David L. Armstrong, Esq., District Attorney, Jefferson County (Louisville), Kentucky.
>
> Frank G. Carrington, Esq., Executive Director, Crime Victims Legal Organization.
>
> Robert L. Edwards, Director, Local Law Enforcement Assistance, Florida Department of Law Enforcement.
>
> William L. Hart, Chief of Police, Detroit, Michigan.
>
> Honorable Wilbur F. Littlefield, Public Defender, Los Angeles County.
>
> Professor James Q. Wilson, School of Government, Harvard University.

One of the recommendations (No. 40) made to the Attorney General by the Task Force read, in pertinent part:

> **In general, evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the reasonable, good faith belief that it was in conformity to the Fourth Amendment to the Constitution . . . We recommend that the Attorney General instruct United States Attorneys and the**

Solicitor General urge this rule in appropriate court proceedings, or support federal legislation establishing this rule, or both.*

The Task Force dissolved on August 17, 1981, when it delivered its Final Report to the Attorney General. Thus, these amici are not an official government body but a group of *former* members. Amici hope, however, that, having taken lengthy testimony about the Rule during hearings, they might be able to assist this Court in reaching its conclusion.

II. *Peace Officers' Associations and Related Groups.* These organizations are designed to promote and foster police and prosecutor professionalism on the national and state levels. These amici include organizations from each of the States from which the present cases arise: The California Peace Officers' Association, County Sheriffs of Colorado, and Massachusetts Association of Chiefs of Police. In addition, these amici include the International Association of Chiefs of Police, Inc., the Illinois Association of Chiefs of Police, Inc., and the Texas District and County Attorneys Association, which is an association of elected district and county attorneys and their assistants in Texas.

III. *Public Interest Law Centers.* A number of centers, foundations, and other organizations that engage in research, litigation, education and public information on criminal justice matters are co-amici on this brief. They include Americans for Effective Law Enforcement, Inc.; The Legal Foundation of America; Southeastern Legal Foundation, Inc.; and Victims' Assistance Legal Organization, Inc.

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* Mr. Littlefield dissented from this recommendation; hence, his name is not associated with this brief. The Seven Members in the majority were Messrs. Bell, Thompson, Armstrong, Carrington, Edwards, Hart and Wilson, all of whom have requested that their names be associated with this brief.

IV. *Other Co-Amici: State of North Carolina, et. al.* Amici are also joined by the State of North Carolina, by and through the Hon. Rufus L. Edmisten, Esq., Attorney General, State of North Carolina, and David S. Crump, Esq., Deputy Attorney General.*

SUMMARY OF ARGUMENT

The "Deterrence" Rationale. The deterrence theory does not justify exclusion of evidence seized in good faith. The good faith standard that is sought is one based upon objective reasonableness. Given the complexity of search and seizure law, it is unlikely that greater deterrence can possibly result from the current rule of universal exclusion. The rule was originally addressed to flagrant misconduct, and a good faith standard would bring the law closer to its purposes. Such a standard would still require exclusion of bad faith searches, the courts would continue to consider such cases, and such remedies as section 1983 actually provide a more effective deterrent in any event.

The "Judicial Integrity" Rationale. Judicial integrity is not served by indiscriminate, universal exclusion. Without a good faith exception, the exclusionary rule actually decreases public respect for the courts. It (1) reinforces the public impression that criminal law is composed of dysfunctional technicalities; (2) is palpably disproportionate to the violation in many cases; (3) creates haphazard results upon guilt or innocence; (4) demoralizes the conscientious officer; (5) makes executive branch responsibility for police conduct more difficult to discharge; (6) places appellate courts in ostensibly shifting and inconsistent doctrinal positions; (7) encourages the accused to conclude that guilt or innocence is irrelevant; and (8) forces officers of the court to present facts untruthfully.

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* Amici wish to acknowledge the assistance of law student Chris Di Ferrante in the preparation of this brief.

ARGUMENT

I. THE DETERRENCE THEORY DOES NOT JUSTIFY EXCLUSION OF EVIDENCE SEIZED REASONABLY AND IN GOOD FAITH.

It is to be emphasized that the good faith standard Petitioners are seeking is an objective standard. As one court said, in adopting a similar objective standard,

> [T]he [search] . . . must be grounded in objective reasonableness. It must therefore be based upon articulable premises sufficient to cause . . . a reasonably trained officer to believe that he was acting lawfully. Thus a series of broadcast breakins and searches carried out by a constable—no matter how pure in heart—who had never heard of the fourth amendment, could never qualify.[1]

There is no evidence that the present universal rule of exclusion accomplishes its purpose better than one based on objective good faith, and in fact there is evidence to the contrary.[2]

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1 Williams v. United States, 622 F. 2d 830 (5th Cir. 1980) (en banc). See also AELE Model Statute, cited in Hearings, note 9 infra, at 227. Although Williams refers to a test that is both objective and subjective, amici here would urge the Court to adopt an objective test.

2 The seminal work is Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. CHI. L. REV. 665, 672, 678 (1970) (empirical study showing absence of deterrent effect and describing rationale as "fig leaf phrases used to cover naked ignorance"). Later, Professor Steven Schlesinger summarized several empirical studies, all of which concluded that deterrence could not be demonstrated, except one, which was inconclusive. S. SCHLESINGER, EXCLUSIONARY INJUSTICE 50-57 (1977). Cf. Comptroller Gen. of the United States,

A. A person cannot be deterred effectively if he cannot be aware, with reasonable certainty, what it is that he is to be deterred from doing.

As a matter of logic, it is unrealistic to expect more effective deterrence of disfavored conduct from a universal rule of exclusion than from one incorporating an objective good faith standard. The complexity of search and seizure law makes it unlikely that greater deterrence can possibly result.

The fragmentation of search and seizure opinions is illustrated by the syllabus to *United States v. Mendenhall*, 446 U. S. 554 (1980):

> Stewart, J., announced the court's judgment and delivered an opinion . . . . with respect to Parts I, II-B, II-C, and III, in which Burger, C. J., and Blackmun, Powell, and Rehnquist, JJ., joined. Powell, J., filed an opinion concurring in part and concurring in the judgment, in which Burger, C. J., and Blackmun, J., joined. White, J., filed a dissenting opinion in which Brennan, Marshall, and Stevens, JJ., joined.

Amici submit that when Justices of the Court disagree over parts and sub-parts of a ruling, it is unrealistic to expect that a police officer, acting under the exigencies that are inherent in police work, should have a superior knowledge of the legal concepts that have split the Court. Such divisions are not unusual in search and seizure law. See also, e.g., *Rose v. Lundy*, 102 S. Ct. 1198 (1982); *Coolidge v. New Hampshire*, 403 U. S. 443 (1971).[3]

Impact of the Exclusionary Rule on Federal Criminal Prosecutions, Rep. No. CGD-79-45 (19 April 1979) (GAO Study); National Institute of Justice, The Effects of the Exclusionary Rule: A Study in California (1982).

3 The Syllabus in Rose v. Lundy is as follows: J. O'Connor delivered the opinion of the court except as to Part III-C, J. Blackmun filed an opinion concurring in the judgment, J.

These difficulties are aggravated by what might be called the "pyramid effect." Each opinion of this Court is at the apex of our jurisprudence, and it is subsequently interpreted by federal courts of appeal, federal district courts, state supreme courts, state appellate courts and state trial courts. For example, Shepard's United States Citations, 1976 supplement, volume 4, lists 42 entries from United States Reports and approximately 1200 lower court entries citing *Mapp v. Ohio*, alone. Each reinterpretation shifts meanings, sometimes slightly, sometimes significantly. A good faith exception would not avoid these complexities, but it would recognize that all that can be expected of a police officer is that he act reasonably and in good faith.

In fact, the universal exclusionary rule is likely to frustrate the policy of deterrence in some instances. For example, it contravenes the fourth amendment preference for warrants, because it makes the showing of a valid search more difficult in the case of a warrant.[4] But more fundamentally, if the exclusionary rule is applied indiscriminately to bad faith misconduct

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Brennan filed an opinion concurring in part and dissenting in part, in which J. Marshall joined, J. White filed an opinion concurring in part and dissenting in part. J. Stevens filed a dissenting opinion.

The syllabus in Coolidge v. New Hampshire is as follows: Stewart, J., delivered the opinion of the court, in which Burger, C. J., (as to Part III) and Harlan (as to Parts I, II-D, and III), Douglas, Brennan, and Marshall, JJ., joined. Harlan, J., filed a concurring opinion, post, p. 490. Burger, C. J., filed a concurring and dissenting opinion, post, p. 492. Black, J., filed a concurring and dissenting opinion, in a portion of Part I and in Parts II and III of which Burger, C. J., and Blackmun, J., joined, post, p. 493. White, J., filed a concurring and dissenting opinion, in which Burger, C. J., joined, post, p. 510.

4 It is sometimes said that exclusion "deters" inadvertent errors by judges issuing warrants. Again, however, the remedy lacks proportionality; exclusion as a deterrent to reasonable conduct is unlikely to increase compliance. Furthermore, such a drastic remedy has never been invoked as to judges' conduct; indeed, judges are absolutely immune to 1983 actions for civil rights violations (even intentional ones), on the theory that they need

and to reasonable, good-faith searches, it cannot have the educational function that its proponents attribute to it. It is more likely to frustrate those who try to comply with it, and frustration is not an effective tool of either education or motivation.

B. The original purpose of the exclusionary rule was addressed to flagrant police misconduct.

Originally, the exclusionary rule was intended to deter "official lawlessness in *flagrant* abuse" of the Constitution.[5] *Mapp v. Ohio*, 367 U. S. 643, 655 (1961) (emphasis added). That the criminal should go free was unfortunate, but it would be far worse for courts "to declare that the Government may *commit crimes* in order to secure the conviction of a private criminal . . . . " *Elkins v. United States*, 364 U. S. 206, 223 (1960) (emphasis added), quoting from *Olmstead v. United States*, 277 U. S. 438, 485 (1928) (Brandeis, J. dissenting).[6]

This was the original theory of the exclusionary rule. But in recent years the rule has been applied in cases in which there has been no police misconduct and in which the police have behaved reasonably in all respects, such as the cases at bar. Evidence has been suppressed simply because the police, or the magistrate upon whom they relied, made a reasonable judgment as to some factual, practical matter, such as the existence of probable cause, with which the court subsequently reviewing their conduct disagreed. Recognition of a good faith exception would go far toward bringing the rule back to its original purpose.

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to be free to decide fearlessly; to use a suppression remedy as a "deterrent" to judges would be anomalous.

5 Much of this discussion originated with the Brief of Petitioner State of Illinois, Illinois v. Gates, 51 U. S. L. W. 4709 (U. S. S. Ct. June 8, 1983) (on rehearing).

6 The "judicial integrity" rationale supports the same view of the exclusionary rule. See Part II of this Brief, infra.

C. *The recognition of a good faith exception will not impair either the deterrence that is attributed to the exclusionary rule or the more effective deterrence that actually results from other remedies.*

The recognition of a constitutional right does not imply that any particular remedy is exclusive. This Court has always recognized the difference between rights and remedies. It has consistently attempted to choose remedies by pragmatic considerations, rather than by doctrines bound to the right that is to be enforced. The choice of one remedy rather than another by a practical calculus of advantages and disadvantages has never been thought to imply any devaluation of the right at issue, nor should it here. [7]

(1) Evidence resulting from bad-faith misconduct will continue to be excluded, and the law of search and seizure will continue to develop.

The law of search and seizure is sufficiently clear in many instances that its violation cannot be characterized as reasonable or in good faith. Extreme examples would include arrests at will of anyone who has previously been convicted of crime, cf. *Beck v. Ohio*, 397 U. S. 89 (1964); dragnet arrests of anyone who might be remotely suspected of crime, cf. *Davis v. Mississippi*, 394 U. S. 721 (1969); surreptitious violations of wiretap statutes, cf. *Alderman v. United States*, 394 U. S. 165 (1969); or unwarranted and unauthorized entry into private premises or residences in the absence of any claim of exigent circumstances, cf. *Ehrlichman v. United States*, 546 F. 2d 910 (D. C. Cir. 1976) (denying good faith defense in criminal prosecution for government official's break-in of office). Amici applaud the basic principles underlying such decisions, and we would point out that

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7 The Memoirs of Mr. Justice Douglas indicate that the Court actually focussed its consideration upon three alternative remedial devices before choosing the exclusionary rule. W. DOUGLAS, THE COURT YEARS 387 (1980).

there are many other situations in which the law is sufficiently clear, or the violation sufficiently serious, that no one could contend that a search or seizure was in good faith. In such clear situations, exclusion of the evidence would follow because the good faith exception advocated here simply would not apply.

For these reasons, the law of search and seizure will continue to develop after a good faith exception is adopted. Good faith and reasonableness do not become relevant issues in the case until there has been a determination in the first instance that the law of search and seizure would otherwise require exclusion. Furthermore, good faith and reasonableness are inseparable from the development of the law, because the *objective* reasonableness of the officer's conduct must always be tested against the law. As one commentator has written, "A reasonable, good faith standard, by retaining an objective element, permits, even necessitates, judicial review." [8] Opponents' objections to the effect that a good faith exception might make rulings on fourth amendment issues "impossible," cf. Brief for American Bar Association as Amicus Curiae at 17 in *Illinois v. Gates*, 51 U. S. L. W. 4709 (U. S. S. Ct. June 8, 1983), are not well taken.

But perhaps the most convincing evidence that the good faith exception would not lead to an atrophy of fourth amendment values comes from the Fifth and Eleventh Circuits. Testimony before the Congress, in its consideration of a statutory alternative to the universal exclusionary rule, indicates no abuse of the good faith exception adopted by both Circuits,[9] and both

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8 Bernardi, The Exclusionary Rule: Is a Good Faith Standard Needed to Preserve a Liberal Interpretation of the Fourth Amendment? 30 De Paul L. Rev. 51, 101 (1980).

9 Support for Exclusionary Rule Modification to Provide for Admissibility of Evidence Obtained by a Law Enforcement Officer Acting in Good Faith, 1982: Hearings on S. 101, S. 751 and relevant portions of S. 1995, before the Subcommittee on Criminal Law of the Senate Committee on the Judiciary, 97th Cong., 2nd Sess. 226-27 (1982).

have continued to decide search and seizure issues in a manner that has continued the development of the law.

(2) There exist more effective remedies against police misconduct.

In contrast to the inefficiency of a universal exclusionary rule, 42 U. S. C. sec. 1983 (1964) (the civil rights damage statute) provides a highly effective deterrent. In situations involving bad faith searches, the damage remedy provides a powerful punitive measure against individual officers. Furthermore, municipalities or other government entities do not have any defense of good faith in 1983 actions. *Owen v. City of Independence*, 445 U. S. 622 (1980). They can thus be held liable for damages caused by a search that is ultimately determined to be unlawful, even if they act in good faith. Claims against municipalities are recognized if the damage is caused by an "official policy" of the municipality,[10] but an official policy need not be formal, and it can be evidenced by such inactions as failure to train officers properly, inadequate supervision, or toleration.[11] It should be reiterated that a bad faith seizure would continue to require suppression under the proposed approach, and thus whatever deterrence can result from suppression would be preserved; but what is more significant is that the "pure hearted" constable referred to above, who committed breakins because he had "never heard of the fourth amendment," would not only see the resulting evidence suppressed, but would himself likely be liable in damages *and* would make his municipality liable because he had been inadequately trained.

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10 Monell v. Dep't of Social Serv., 436 U. S. 658 (1978).

11 Owens v. Haas, 601 F. 2d 1242 (2nd Cir. 1979), cert. denied sub nom. County of Nassau v. Owens, 444 U. S. 980, 100 S. Ct. 483, 62 L. Ed. 2d 407 (1979); Turpin v. Mailet, 619 F. 2d 196 (2nd Cir.), cert. denied sub nom. Turpin v. West Haven, 449 U. S. 1016, 101 S. Ct. 577, 66 L. Ed. 2d 475 (1980). See also Webster v. City of Houston, 689 F. 2d 1220 (5th Cir. 1982).

As this Court has said, "The disciplinary or educational effect of the court's releasing the defendant for police misbehavior is so indirect as to be no more than a mild deterrent at best." *Irvine v. California*, 347 U. S. 128, 136-37 (1954) (plurality opinion). While few remedies are perfect, the 1983 remedy is far superior. It provides a direct protection to innocent victims of unlawful police conduct, and in the case of municipal liability it does so even if the unlawful acts are committed in good faith. Furthermore, it places the onus on the person or entity whose action caused the violation. The direct benefits of the exclusionary rule are available only to guilty criminals, and perhaps more importantly, the object of its punishment is the society at large.

II. A GOOD FAITH EXCEPTION IS FULLY CONSISTENT WITH THE "JUDICIAL INTEGRITY" RATIONALE.

A. The "judicial integrity" rationale is not served by the exclusion of evidence seized reasonably and in good faith. Rather, the needless and counterproductive exclusion of such evidence itself impairs judicial integrity.

A second principle that is sometimes said to underlie the exclusionary rule is that courts should avoid the taint of illegally seized evidence. E.g., *Mapp v. Ohio*, 367 U. S. 643 (1961). Courts are nondemocratic institutions without independent enforcement mechanisms. If their orders are to prevail in unpopular as well as popular causes, they must have public respect.

To the extent that there is validity to this rationale, it is the exclusion of evidence honestly and reasonably seized, not its reception, that actually impairs judicial integrity.

(1) Impairment of judicial integrity through the public impression of criminal law as a mass of technicalities.

The first way in which the exclusion of honestly and reasonably seized evidence taints a court is by creating a public impression that the criminal law is a mass of dysfunctional technical-

ities. This danger was articulated by Mr. Justice Cardozo in *Snyder v. Massachusetts*, 291 U. S. 97, 122 (1934), as follows:

> There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free.

Although the error in *Snyder* was exclusion of the defendant from the proceedings and an improper remark by the trial judge, rather than an illegal seizure, the reasoning applies equally to the cases at bar.

(2) Harm to judicial integrity because the rule is generally disproportionate in its effects to the violation.

Secondly, proportionality is such an important value in the criminal law that it is typically examined by every first-year law student. But the current enforcement of the exclusionary rule is seriously inconsistent with this fundamental principle. Cf. S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 155-67 (3rd ed. 1975). Such philosophers as Bentham, Hart, Stephen, and Feinberg have emphasized the disrespect that the law engenders when its response is disproportionate to the severity of an alleged violation. Id. As Mr. Chief Justice Burger said in dissent in *Bivens v. Six Unknown Agents*, 403 U. S. 388, 419 (1971), "Freeing either a tiger or a mouse in a schoolroom is an illegal act, but no rational person would suggest that these two acts should be punished in the same way."

In one of the decisions below, a relatively slight and honest oversight in conditions of great time pressure caused the exclusion of crucial evidence gained by excellent police work, against a murderer who burned the unconscious but living body of his victim with gasoline. *Commonwealth v. Sheppard*, 441 N. E. 2d

725 (Mass. 1982). All who are affected by the case must feel that this all-or-nothing approach is disproportionate.

(3) Impairment of judicial integrity by haphazard results on guilt or innocence.

Third, exclusion of reasonably and honestly seized evidence taints the criminal justice system by causing haphazard adjudication of guilt or innocence. Inconsistent results are sometimes unavoidable under the Constitution, but they should not be encouraged when unnecessary.

An incident that occurred several years ago in Harris County (Houston), Texas illustrates the point. The District Attorney presented seventy-three drug possession cases, some of which were appropriate for no-bills because of searches that would require suppression, and some of which were appropriate for true bills because of searches deemed valid. The grand jury, however, no-billed all cases in both groups, in part because it was unable to rationalize differential treatment of the persons involved on the basis of what the grand jurors apparently regarded as irrational distinctions. Interview with James Larkin, Assistant District Attorney of Harris County, Texas, in Houston, Nov. 24, 1980. The haphazard adjudication that this grand jury impliedly condemned would not be removed by a good faith exception, but it would be lessened.

(4) Impairment of judicial integrity owing to a demoralizing effect upon the honest and conscientious police officer.

Fourth, exclusion of reasonably and honestly seized evidence taints the courts by demoralizing the conscientious police officer, making him less likely, not more likely, to understand and follow fourth amendment decisions. Fourth amendment law immediately dissolves into ambiguity in a concrete factual situation. The variety of probable cause judgments is infinite. It is overlaid by a bewildering array of doctrines such as plain view, stop and frisk, inventory, exigent circumstances, and consent. Procedural considerations such as standing and burden of proof

influence a variety of cases. The officer will see a seemingly reasonable seizure struck down in one case and a borderline one upheld in the next.

Even experts complain that they cannot understand search and seizure law. As two prominent criminal defense lawyers have written,

> In determining the balance, guidelines have been spelled out by the Supreme Court. A great deal of difficulty arises in applying the many guidelines to a particular set of facts . . . . [T]he decisions dealing with search and seizure appear to be in a constant state of change.

Rawitscher & Carnahan, *Search and Seizure and Suppression Proceedings*, in STATE BAR OF TEXAS, ADVANCED CRIMINAL LAW COURSE (D. Crump ed. 1979). If the decisions induce this reaction in a criminal law scholar, they must resemble a roulette wheel to the officer who risks his life in good faith, only to be told that his conduct was "illegal" and must be "deterred" by suppression. Research confirms what common sense suggests: aberrational acts of misconduct are most common in situations in which individuals, including police officers, perceive that they are unlikely to obtain justice in the court system. Cf. N. JOHNSON, L. SAVITZ & M. WOLFGANG, THE SOCIOLOGY OF PUNISHMENT AND CORRECTION 11 (1962).

The three cases at bar are an example. In *Colorado v. Quintero*, it can only engender disrespect for courts if the officers are told they acted illegally, when they honestly and quite reasonably made the judgment, in the field, that probable cause existed, and their only other choice was to let the suspect leave with property of victims that any ordinary person would conclude was stolen. In *Leon* and *Sheppard*, the officers acted on the authority of warrants issued, from all that appears, by courts acting as they sincerely deemed the law required; and for the officers to fail to execute such a warrant would have been, itself, an act of disobedience of a court order. Yet in response to their obedience, the officers are told by the suppression order that

their conduct was "willfully" unlawful, to use the words of *Michigan v. Tucker*, 417 U. S. 433, 477 (1974).

(5) Impairment of judicial integrity because of the difficulty of a court's performing a task given to the executive, that of maintaining detailed policies for police performance.

The executive is the branch charged with supervision of the details of law enforcement. Efforts by courts to maintain detailed supervision of police performance are an erosion of the separation of powers and are likely to impair the ability or motivation of the executive to undertake the task. The essence of professionalism is repeatable procedures, and the confusing overlay of doctrines in search and seizure frustrates the ability of the executive to prescribe uniform conduct. It also dilutes the public perception of the locus of responsibility. Furthermore, the "secondhand" control of the exclusionary rule is simply ineffective to supervise with the kind of detail the courts have attempted, making the courts themselves appear ineffectual. If the conduct is seriously inconsistent with law, suppression may be more clearly justified, but this result would follow from the recognition of a good faith exception.

(6) Impairment of judicial integrity by the appearance of shifting and inconsistent appellate decision-making.

Sixth, the present administration of the exclusionary rule places appellate courts in ostensibly shifting and inconsistent doctrinal positions. This Court has withheld suppression when the illegality has been attenuated by intervening events, the defendant has lacked standing, the challenge has arisen in a habeas corpus action, use of the evidence was before the grand jury, use was for impeachment, or the resulting arrest was used to increase sentence in another case.[12] On occasion, doctrinal

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12 United States v. Ceccolini, 435 U. S. 368 (1978); Stone v. Powell, 428 U. S. 465 (1976); United States v. Peltier, 422 U. S.

justification fails to prevent the appearance of a zig-zag course; this is especially so in cases involving vehicles taken to another location, containers, and searches incident to arrest.[13] These difficulties are the natural result of practical efforts with conflicting policy, but they create a nagging suspicion that interpretive principles cannot be reconciled with a reasonable view of the fourth amendment. Often, the true reason for admitting evidence is that the officer has acted honestly and reasonably, and explicit recognition of this reason would bring the law into line with its purposes.

(7) Impairment of judicial integrity by the effect on the accused: The perceived irrelevance of guilt or innocence.

Seventh, the exclusionary rule taints the criminal justice system by inducing the accused to believe that his guilt or innocence is not important. One popular author has written that "innocence becomes less relevant" as the criminal justice system progresses. F. L. BAILEY, THE DEFENSE NEVER RESTS 1 (1968). Disparate treatment creates cynicism in the accused. It has been identified by wardens in some states as a greater cause of prison unrest than food, overcrowding, or conditions of incar-

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531 (1975); Michigan v. Tucker, 417 U. S. 433 (1974); United States v. Calandra, 414 U. S. 338 (1974); United States v. Tucker, 404 U. S. 433 (1972); Harris v. New York, 401 U. S. 222 (1971).

13 With respect to automobile searches, compare Chambers v. Maroney, 399 U. S. 42 (1970); Preston v. United States, 376 U. S. 364 (1964); Husty v. United States, 282 U. S. 694 (1931); and Carroll v. United States, 267 U. S. 132 (1925) with Arkansas v. Sanders, 442 U. S. 753 (1979); Texas v. White, 423 U. S. 67 (1975); Coolidge v. New Hampshire, 403 U. S. 42 (1971). With respect to containers, compare United States v. Ross, 102 S. Ct. 2157 (1982) with Arkansas v. Saunders, 442 U. S. 753 (1979). As to searches incident to arrest, compare United States v. Rabinowitz, 339 U. S. 56 (1960) (overruling prior authority) with Chimel v. California, 395 U. S. 752 (1969) (overruling Rabinowitz).

ceration. COUNCIL ON STATE GOVERNMENTS, DEFINITE SENTENCING 10 (1976). Although this finding was stated in the context of sentencing disparity, the same kind of prisoner cynicism is likely to be generated when disparity is caused by the exclusionary rule.

(8) Untruthful fact presentation to jurors by officers of the court.

Finally, the exclusion of reasonably and honestly seized evidence taints the criminal justice system by presenting an untruthful impression to the trier of fact. A conscientious defense lawyer is likely to argue to the jury that the government has not presented sufficient evidence in a trial from which evidence has been suppressed. He is likely to follow with criticism of the government for prosecution of the case without the type of evidence that is missing.[14]

If the seizure is flagrantly improper, suppression may be justifiable; however, a juror is likely to feel that he has been unfairly tricked if he learns that the truth has been hidden from him by officers of the court notwithstanding a reasonable, good-faith search. Perhaps the saddest effect of this misrepresentation is its effect upon defense counsel. It is understandable that many attorneys avoid the criminal defense practice because they do not wish to be the tools of such deception.

B. The "judicial integrity" rationale is circular when it is used to exclude evidence seized reasonably and in good faith.

The label of "illegality" in search and seizure law does not, by itself, adjudge the integrity of the officer's conduct. Often,

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14 The "open door" or reply doctrine would allow prosecution response if defense counsel referred by name to the specific item suppressed, but through the exercise of minimal skill, defense counsel can make a general enough reference to prevent response and still get the point across.

the label is affixed in spite of recognition that an officer has acted reasonably and sincerely (as in the present cases), and it represents only a conclusion that the policies of the fourth amendment would be best served in a pragmatic way by exclusion or that case authority so interprets those policies. But when a court has thus determined illegality without regard to the *actual* propriety of the acts leading to the seizure, there is an absence of logic in the assertion that the label of "illegality" the court has itself thus affixed to the evidence would undermine its integrity. In these circumstances, in other words, it is circular to say that judicial integrity demands exclusion.

CONCLUSION

The recognition of an objective good-faith standard is not made inappropriate by the deterrence theory. The complexity of search and seizure makes it unlikely that greater deterrence can possibly result from universal exclusion. Bad faith searches would still require exclusion, the courts would continue to consider such cases, and such remedies as section 1983 actually provide more effective deterrence than exclusion in any event.

Furthermore, the recognition of a good-faith exception to the judicially created rule of exclusion would not impair judicial integrity. Instead, it is the unnecessary and counterproductive exclusion of evidence seized reasonably and in good faith that actually threatens to impair public respect for courts. The decisions below should be reversed.

Respectfully submitted,

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